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Review of application and implementation of the Set

Model Law on Competition (2010) – Chapters I - XII (Compilation)

GE.10-51724

Objectives or purpose of the law

To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development

COMMENTARIES ON CHAPTER I AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. The role of this article is to state the objectives and purposes of the law, and thus to guide the interpretation and application of its operative provisions. The substantive prohibitions and prescriptions of the law should be interpreted in a manner that furthers the achievement of its objectives and purposes.

2. The article has been drafted in accordance with section E, paragraphs 1 and 2 of the Set of Principles and Rules, which reads as follows:

> *"1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implement judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.*
> *"2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact."*

3. Like in section A of the Set of Principles and Rules, States may wish to indicate further specific objectives of the law – such as (a) the creation, encouragement and protection of competition; (b) control of the concentration of capital and/or economic power; (c) encouragement of innovation; and (d) protection and promotion of social welfare and in particular the interests of consumers, etc. – and take into account the impact of restrictive business practices on their trade and development.

4. It should further be noted that competition law terminology has evolved since the adoption of the Set of Principles and Rules in 1980. Today, the term anti-competitive business practices/behaviour is more frequently used than the term restrictive business practices.

Objectives

5. The fundamental objective of competition law is to promote and protect competition within markets. A number of more specific goals fall within that overarching objective. The main goals are outlined below:

Consumer welfare

6. In general, maximizing consumer welfare consists of lowering prices, raising output, enhancing consumer choice and the quality of goods and services, and driving technological development and innovation. Among different schools of economic theory, there is, however, a debate on the dimension of consumer welfare. Some schools of thought equate consumer welfare with total welfare (producer and consumer welfare); they do not worry about the transfer of wealth from consumers to producers, which results from higher prices, lower output, or any other variable affecting demand. Their main concern is the loss of transactions caused by a distortion of competition. Other schools believe that the consumer welfare objective prioritizes the welfare interests of consumers over those of producers.[1] They are concerned not only with the loss of transactions in less competitive markets, but also with the transfer of wealth from consumers to producers and the ability of more consumers to more actively participate in the market.

Efficiency

7. Efficiency includes allocative efficiency (allocating resources to their most valued use), productive efficiency (producing goods at the lowest cost) or dynamic efficiency (developing better goods and services through innovation). Competition aims to create an environment that incentivizes market participants to enhance efficiency: for example, by investing in technological development or minimizing production costs.

The competitive process

8. Maintaining the competitive process may be considered by some an objective in and of itself. Competition laws may aim to preserve competition as a process in order to curb coercive, exclusionary and exploitative conduct, to prevent the raising of barriers to entry and to preserve rivalrous behaviour in the market.

9. Protecting the competitive process is considered as a means to achieve the objectives of consumer welfare and efficiency.

Other considerations

10.Competition laws may in addition include a variety of considerations that are not strictly related to competition or economic efficiency. For example, a number of recitals in competition laws include "fair" competition as an objective. This may mean protecting opportunities for small and medium-sized enterprises or traditional community economies. Further, some competition laws may refer to national economic development sometimes including regional development, or other industrial policy goals.

11.In the United States, the jurisprudence takes a hard line against inclusion of non-competition issues as part of an antitrust analysis. For example, the United States Supreme

[1] For further discussion on these schools of thought, see Orbach BY (2010). The Antitrust Consumer Welfare Paradox. Arizona Legal Studies Discussion Paper No 10-07. 16 February.

Court stated that the purpose of antitrust analysis "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry".

12.Many States' competition laws will include many or all of these objectives. Often, they can be reconciled, but occasionally they will conflict. This is most likely where a State's competition law includes public interest goals that do not strictly relate to competition or economic efficiency. There is a degree of ambiguity in the boundaries of these objectives, which must be resolved over time by decisions of courts or competition authorities.

Alternative approaches in existing legislation – objective/purpose

Region/country	
Africa	
Algeria	"The organization and the promotion of free competition and the definition of the rules for its protection for the purpose of stimulating economic efficiency and consumer welfare". See Article 1 of the Ordonnance No. 95-06 of 23 Chaâbane 1415, 25 January 1995 regarding Competition.
South Africa	The preamble of the South African Competition Act sets out the following objectives: - "Provide all South Africans equal opportunity to participate fairly in the national economy; - "Achieve a more effective and efficient economy in South Africa; - "Provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; - "Create greater capability and an environment for South Africans to compete effectively in international markets; - "Restrain particular trade practices which undermine a competitive economy; - "Regulate the transfer of economic ownership in keeping with the public interest; - "Establish independent institutions to monitor economic competition; and - "Give effect to the international law obligations of the Republic."
Zambia	The objectives in Zambian legislation are set in the preamble and are to (a) encourage competition in the economy by prohibiting anti-competitive trade practices; (b) regulate monopolies and concentrations of economic power; (c) protect consumer welfare; (d) strengthen the efficiency of production and distribution of services; (e) secure the best possible conditions for the freedom of trade; (f) expand the

Region/country	
	base of entrepreneurship; and (g) provide for matters connected with or incidental to the foregoing. Under section 2 of the Act, “trade practice” means any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service. (Competition and Fair Trading Act 1994.)
Asia/Pacific	
China	In China, according to Article 1 of the Anti-monopoly Law of the People’s Republic of China, the law is enacted for the purpose of preventing and curbing monopolistic conduct, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of the socialist market economy.
India	The Competition Act, 2002, objective is “keeping in view the economic development of the country... to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental to”. (Section 1, Competition Act 2002 as amended by The Competition (Amendment) Act, 2007.)
Mongolia	The competition law seeks to “regulate relations connected with prohibiting and restricting State control over competition of economic entities in the market, monopoly and other activities impeding fair competition”. (Article 1, Law of Mongolia in Prohibiting Unfair Competition,1993.)
New Zealand	The purpose of the competitoin legislation is “to promote competition in markets for the long-term benefit of consumers within New Zealand”. (Section 1A Commerce Act, 1986. (Section 1A was inserted, as from 26 May 2001, by Section 4 of the Commerce Amendment Act 2001 (2001 No. 32).)
Taiwan Province of China	The legislative purpose of the Fair Trade Law is to maintain trading orders, to protect consumers’ interests, to ensure fair competition, and to promote economic stability and prosperity. (Article 1, Chapter 1, Fair Trade Act, 2010.)
Europe (non-EU)	
Armenia	The purpose of the law is to “protect and encourage free economic competition, ensure appropriate environment for fair competition, promote development of entrepreneurship

Region/country	
	and protection of consumers' rights in the Republic of Armenia". (Article 1, Law of the Republic of Armenia on Protection of Economic Competition as supplemented by the HO-N Law adopted in 2007.)
Norway	Competition legislation seeks to "further competition and thereby contribute to the efficient utilization of society's resources… special consideration shall be given to the interests of consumers". (Section 1, Competition Act, 2004 as amended.)
Russian Federation	The competition legislation seeks to achieve "a common economic area, free movement of goods, protection of competition, freedom of economic activity in the Russian Federation and to create conditions for effective functioning of the commodity markets". (Article 1, Russian Federal Law No. 135-FZ "On the Protection of Competition", 2006.)
Switzerland	The competition legislation seeks "to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a market economy based on liberal principles". (Chapter 1 Article 1, Federal Act on Cartels and other Restraints of Competition, 1996 as amended.)
Ukraine	The objective of the law is the maintenance and protection of economic competition, for the limitation of monopolism in economic activities, and shall be directed towards ensuring the efficient functioning of the economy of Ukraine on the basis of the development of competitive relations. (Law on the Protection of Economic Competition, 2001.)
European Union	
Denmark	Objective of the legislation is "to promote efficient resource allocation in society through workable competition for the benefit of undertakings and consumers". (The Competition Act (Consolidation Act) Consolidation Act 2007.)
Estonia	The scope of application of the legislation is the "safeguarding of competition in the interest of free enterprise upon the extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services… and the preclusion and elimination of the prevention, limitation or restriction…of competition in other economic activities". In addition, legislation "applies if an act or omission directed at restricting competition is committed outside the territory of Estonia but restricts competition within the territory of Estonia". (Section 1, Article 1 Competition Act 2001 as amended.)

Region/country	
Hungary	The competition law aims to protect the "public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers". (Preamble to Competition Act, 1996 as amended.)
Spain	The objectives of the law are stressed in the "explanatory statement": The existence of effective competition between businesses constitutes one of the defining elements of the market economy, disciplines the action of businesses and reallocates the productive resources in favour of the most efficient operators or techniques. This productive efficiency translates to the consumer in the form of lower prices or an increase in the quantity offered of the products, their variety and quality, with the subsequent increase in the welfare of society as a whole…Consequently, it is necessary to have a system that, without intervening unnecessarily in free business decision-making, allows for the adequate instruments to guarantee the good functioning of market processes. (Competition Act 2007.)
Sweden	The competition legislation aims to "eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products". (Competition Act (2008:579 of 18 June 2008, Chapter 1.)
European Union	Article 3(1)(g) of the Treaty establishing the European Community, which listed one of the EC's objectives as the implementation of "a system ensuring that competition in the internal market is not distorted", has been repealed by the Treaty of Lisbon. Articles 2 and 3 of the Treaty on European Union (TEU) setting out the values and aims of the European Union do not mention expressively "undistorted competition" but instead mention the establishment of an internal market as an objective and refer to "a highly competitive social market economy". However, the new legally-binding Protocol 27 on Internal Market and Competition states that "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted".
Latin America	
Brazil	This Law sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power. Sole Paragraph. Society at large is entrusted with the legal rights protected herein. (Article 1, Law No. 8884 of June 11,

Region/country	
	1994.)
Colombia	Article 333 of the Constitution adopted in 1991 made competition a constitutional right, stipulating that the State should pass laws that prevent "the obstruction or restriction of economic liberty and shall prevent or control any form of abuse that persons or businesses make of their dominant market position".
Panama	The purpose of the competition legislation is to "protect and secure the process of free economic competition, eradicate monopolistic practices and other constraints on the efficient functioning of the markets for goods and services, and safeguard the greater interests of consumers". (Article 1, Law No. 29 of 1 February 2006 on Rules for Protecting Competition and other Measures.)
Peru	The competition legislatoin aims to "eliminate monopolistic, controlling, and restrictive practices vis-à-vis free competition in the production and marketing of goods and the provision of services, allowing free private enterprise to develop so as to maximize the benefits for users and consumers". (Article 2, Legislative Decree No. 701 Against Monopolistic, Control and Restrictive Practices Affecting Free Competition.)
The Bolivarian Republic of Venezuela	"The objective of the law is to promote and protect the exercise of free competition and the efficiency that benefits the producers and consumers; and to prohibit monopolistic and oligopolistic practices and other means that could impede, restrict, falsify, or limit the enjoyment of economic freedom". (Article 1, Law to Promote and Protect the Exercise of Free Competition.)
Andean Community	Regulation seeks to "prevent or correct distortions in competition caused by practices that restrict free competition". (Article 1,Decision 285 of the Commission of the Cartagena Agreement.)
MERCOSUR	The Decision 18/96 "Protocolo de Defensa de la Competencia en el MERCOSUR", from 17 December 1996 pursues the objective "to protect competition within MERCOSUR".
North America	
Canada	The purpose of this Act of Competition Legislation is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in

Region/country	
	order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices". (Section 1.1, Competition Act of 1985 as amended.)
United States	The antitrust legislative framework was designed to be "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions". (The United States Supreme Court, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).)

Annex

Competition legislation in United Nations Member States and other entities

Africa	Asia and Pacific	Countries in transition	Latin America and Caribbean	OECD countries
Algeria (1995, 2003)*	China (1993, 2008)	Armenia (2000)	Argentina (1980, 1999, rev. 2001)	Australia (1974 last rev. 2009)
Benin* (WEAMU legislation applicable)	Fiji (1992 rev 1998, 2005)	Azerbaijan**	Plurinational State of Bolivia*	Austria (1988, 2002, 2005)
Botswana (2010)	Indonesia (1999)	Belarus **	Brazil (rev. 1994, rev. 2002)	Belgium (1991, 1999,2002, 2006)
Burkina Faso (1994 last rev. 2002). (WEAMU legislation applicable)	India (1969, 2002, 2007)	Bulgaria (2008)		Canada (1889,1985 last rev. 2010)
Cameroon (1998)	Indonesia (1999)	Croatia (2003)	Chile (1973, rev. 1980, rev. 2005)	Czech Republic (1991, last rev 2009)
Central African Republic (WEAMU legislation applicable)	Jordan (2004)	Georgia (2003) **	Colombia (1992 rev 2009)	Denmark (1997, last rev. 2007)
Egypt (2005)	India (1969, 2002)	Kazakhstan**	Costa Rica (1992, 1994)	European Union (1957 last rev. 2009)
Côte d'Ivoire (1978, 1991, 1997) (WEAMU) legislation applicable)	Malaysia*	Kyrgyzstan**	Dominican Republic (2008)	Finland (1992 last, rev. 2004)
Gabon (WEAMU legislation applicable)		Lithuania (1999	El Salvador (2006 rev 2007)	France (1977, 2008)
Ghana*	Pakistan (1970, 2007, 2010)	Mongolia (1993 rev 2000))	Guatemala*	Germany (1957, rev. 1998 & 2005)
Kenya (1988)*	Malaysia*	Republic of Moldova (1992, 2000)**	Honduras (2006)	Greece (1977, rev. 1995 & 2000)
Lesotho*	Philippines*	Romania (1996 rev 2003)	Jamaica (1993)	Hungary (1990, 1996, last rev 2010)
Malawi (1998)	Singapore (2006)	Russian Federation (1991, 1995 & 2006)	Mexico (1993)	Ireland (1991, 2002 last rev) 2006)
Mali (1998)	Sri Lanka (2003)	Slovenia (1999, 2004)	Nicaragua (2007)	Italy (1990, 2005, 2006)
Mauritius (2007)	Taiwan Province of China (2010)	Tajikistan (2005)**	Panama (1996, 2008)	Japan (1947, last rev 2009)
Morocco (1999)	Thailand (1979, 1999)	Turkmenistan**	Paraguay*	Latvia (2002 last rev 2009)
Namibia (2003)	Viet Nam (2004)	Ukraine (2001)	Peru (1990)	Luxembourg (2004, last rev. 2008)
Swaziland (2008)		Uzbekistan (1996)	Trinidad and Tobago (2006)	Malta (1995 last rev 2007)
Senegal (1965, 1994) (WEAMU legislation applicable)			Bolivarian Republic of Venezuela (1992)	Netherlands (1997 last rev 2009)
South Africa (1955, amended 1979, 1998, 2000, 2009)				New Zealand (1986 rev 2008)
Togo*				Norway (2004 rev 2008)
Tunisia (1991)				Poland (2007)
United Republic of Tanzania (1994, 2003)				Portugal (2003 last rev 2008)
Zambia (1994)				Republic of Korea (1980, last rev 2007)
Zimbabwe (1996, rev 2001)				Slovakia (2001 last rev 2009)
COMESA				Spain (1989, last rev. 2007)

UEMOA (1994, 2002) CARICOM MERCOSUR				Sweden (1993 last rev. 2008) Switzerland (1985, rev. 1995 & 2004****) Turkey (1994, last rev 2009) United Kingdom (1998 & 2002) United States (1890, rev. 1976)

* Competition law in preparation.

** Most CIS countries have established an antimonopoly committee within the Ministry of Economy or Finance.

*** Fair Trade Practices Bureau established January 1999.

Definitions and scope of application

I. Definitions

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

(b) "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

(c) "Mergers and acquisitions" refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.

(d) "Relevant market" refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

COMMENTARIES ON CHAPTER II AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

I. *Definitions*

Introduction

1. Most competition laws include a definitional section. Some include a preliminary catalogue of definitions, which lists a number of terms used in the legislation; others include a definition of a term only in the section of the legislation where it is actually used. In the latter case, the question arises whether the definition applies to the respective section only, or whether it has also to be used for the reading of the remainder of the law. This question is to be answered according to the rules governing interpretation in a given legal system.

2. Definitions shall make the reading of the law easier, and prevent confusion or ambiguity. For this purpose, they stipulate those elements that are essential for the application of terms which in ordinary usage may have uncertain or multiple meanings. They may also attribute a meaning to a term that is different from its common usage, e.g. by broadening or restricting the term's signification within the meaning of the law.

3. When designing a competition law, the legislature should take into account that definitions ensure that the enforcement agency applies the law according to the will of the legislature. However, too many or too strict definitions can also restrict an authority's flexibility and power to expand or limit the reach of the legislation as prevailing social or economic circumstances require. Also, there is a risk that defining a concept will create an exception or exemption by implication (or default).

4. A frequent technique to formulate legal definitions uses definitions that result from established decisional practice and are therefore without ambiguity and will not give rise to troublesome variations in case law that subverts the intent of the legislation as a whole. Adhering to widely accepted principles means that the definitions have been tested over time and will most likely stand up to challenge in a court of law. Also, it is more likely that, if a definition has been tried and tested – that is, it has withstood challenges in the case law of more mature competition regimes – then younger competition law regimes are more willing to adopt it.

5. In this respect, younger competition law systems can benefit from definitions elaborated in more established competition law systems, which have proved useful over time. For example, as between Barbados and Jamaica, Jamaica would be viewed as the more mature, and certainly the older, competition regime and the definition of "enterprise" in Jamaican legislation excludes from the ambit of the legislation a person who "works under a contract of employment; or holds office as director or secretary of a company and in either case is acting in that capacity [...]". So too in the case of Barbados we see the legislation defining enterprise

in a way which excludes an “employee” or “officer” of a body from the purview of the legislation.[2]

6. Against this background, it is also not surprising that young competition law systems such as India, Barbados, Nigeria and Jamaica appear to have defined more terms than the more mature agencies such as the United States, the European Union (EU) and the United Kingdom, since they could access definitions emanating from the decisional practice in these countries.

7. Furthermore, given international efforts aiming at conversion and development of best practices in competition law enforcement (e.g. by the International Competition Network), as well as the exchange of experience facilitated by international organizations, such as UNCTAD and the Organization for Economic Cooperation and Development, it is also no coincidence that definitions proffered by various legislation tend to resemble each other.

8. In jurisdictions where legal reforms tend to be a cumbersome and lengthy process, definitions of competition law concepts and terms might not be included in the law that has to be formally enacted. Instead, they might be published in agency guidelines, notices and discussion papers. For example, amendments of European competition law contained in the Lisbon Treaty[3] require consent of all EU member States and amendments of competition provisions contained in and Council regulations require a qualified majority, which can involve a highly political and lengthy process. As a consequence, a great number of definitions and competition law concepts are laid out in regulations and notices by the European Commission.

9. Publishing definitions and competition law concepts in guidelines and discussion papers first may also be a way to test them prior to proceeding to legal reforms. However, it should be noted that defining terms in guidelines, notices, etc. does not have the authority of terms defined in legislation.

Definitions provided for by the Model Law on Competition

10.Chapter II (1) of the Model Law on Competition provides several definitions typically contained in competition legislation. However, it needs to be emphasized that this list is not exhaustive. On the contrary, casual observation will likely lead the reader to wonder why, in comparison to the typical competition legislation, there are so few definitions in the Model Law. The definition section in the Model Law leaves out many of the definitions that are commonly found in various competition laws worldwide: for example, the terms “subsidiary” or “affiliated company” and also “agreement”.

11.The rather limited selection of definitions provided for by the Model Law can be explained by the fact that it was drafted by agreement. Nothing is included in the Model Law that would have been objected to by even one of the many member States. There is a certain

[2] See the definition of “enterprise” in the Preliminary section of the Jamaica Fair Competition Act, Act 9 of 1993 and the Barbados Fair Competition Act, 2002-19, CAP.326C.

[3] Treaty on the Functioning of the European Union (TFEU).

commonality in the terms that are defined. For example, those that have been listed in the Model Law are those that have been agreed upon by the various competition law agencies; and one can point to a typical term that will be defined in almost all the competition legislation – whether or not the same word is used, we can identify that the same concepts are addressed. For example, in almost all of the legislation surveyed, we see a definition that directs the substantive provisions of the legislation to govern entities engaged in economic activity and sometimes State action.

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

12.Competition laws generally apply to the entire range of different business actors described in Chapter (II) (1) a) of the Model Law. In order not to repeat the entire description in the substantive provisions of the law, an underlying definition/understanding of its addressees is crucial. Defining the addressees of competition law requires particular caution, since it limits the subjective scope of application of the law.

13.Different approaches can be observed. As already mentioned, certain competition law systems do not provide for a statutory definition of the law's addressees, but rely upon the decisional practice of the enforcement bodies to establish an appropriate definition over time, see example from the EU below.

14.When the legislature opts for a statutory definition of the addressees of competition law, the following consideration should be taken into account. A mere listing of all forms of business actors subject to the application of the competition law does not allow for a flexible application of the law to new forms of economic entities, which might not have been known when the static definition was adopted. Therefore, it appears useful to allow for some flexibility when defining the addressees of a competition law, by stipulating the essential characteristics, which determine the competition law's addressees. This approach was chosen by the Model Law on Competition, which focuses on the engagement in commercial activities when defining enterprises as its addressees.

Alternative approaches in existing legislation – Definition of the law's addressees

Country	
Competition law without a statutory definition of the law's addressees	

Country	
EU	Addressees of EU competition law are “undertakings”. See for instance Articles 101 and 102 of TFEU, which prohibit anti-competitive agreements, decisions and concerted practices between “undertakings” and the abuse of its position by a dominant “undertaking”. However, EU competition law does not provide for a statutory definition of the term “undertaking”. Over time, a functional understanding of the concept of undertaking has been established by European case law. Accordingly, “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”[4] is considered as an undertaking subject to EU competition law.
Competition law providing for a statutory definition of the law’s addressees	
Indonesia	Addressees of the Indonesian competition law are all business actors, which are defined as “any individual or business entity, either incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field.”
India	The Indian Competition Act 2002 defines “enterprise” as “a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by departments of the Central Government dealing with atomic energy, currency, defence and space.”[5]
Ukraine	In Ukraine, an economic entity is defined as denoting such a legal person irrespective of its organization and legal form, its form of ownership or such a natural person that is engaged in the production, sale or purchase of products and in other economic activities, including a person who exercises control over another legal or natural person; a group of economic entities if one or several of them exercise control over the

[4] Case of the Court of Justice of the European Union, C-41/90 *Höfner and Elser v. Macrotron GmbH* [1991] E.C.R. I-1979.

[5] The Competition Act of India, 2002, No.12 of 2003, Section 2.

Country	
	others. Bodies of State power, bodies of local self-government, bodies of administrative and economic management and control shall also be considered as economic entities in terms of their activities in the production, sale, and purchase of products or in terms of their other economic activities.[6]
Armenia	The Armenian competition law states that "the present Law shall apply to those activities and conduct of economic entities, Government and local Government administration bodies, which might result in the restriction, prevention and distortion of competition or in acts of unfair competition, except where otherwise stipulated by law"; see Article 2 (1) of the Law of the Republic of Armenia on the Protection of Economic Competition.
Republic of Korea	The scope of Republic of Korea competition law extends to all enterprises. This includes employees, officers or agents who act in the interest of the "enterpriser". Exceptions extended to agriculture, fishery, forestry and mining, were abolished in the revision of the Law (Article 2-1). [7]
Zambia	In Zambia, Section 6(1) of the Zambian Act outlines the scope of application of the Act, presented as a function to monitor, control and prohibit acts or behaviors which are likely to adversely affect competition and fair trading in Zambia. Acts or behaviour are carried out by "persons" which include an individual, a company, a partnership, an association and any group of persons acting in concert, whether or not incorporated, unlike in the model law[8].

(b) "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

15.The definition of "dominant position of market power" is based on section B (i) (2) of the Set of Principles and Rules. Note that most competition laws today either refer to a dominant position/dominance or to substantial market power. Both terms, which tend to be used interchangeably, can be defined as economic strength enjoyed by an undertaking, which

[6] Law of Ukraine on the Protection of Economic Competition, 11 January 2001, No. 2210-III, Article 1.

[7] Monopoly Regulation and Fair Trade Act (Republic of Korea), Law No.3320, 31 December 1980, Article 2.1.

[8] Zambian Competition and Fair Trading Act, No.18 of 1994, Cap 417, Section 2.

enables it to prevent effective competition on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. In such a situation, the company in question has the ability to raise prices consistently and profitably above competitive levels. For further explanation regarding this issue, see the commentaries on Chapter IV of the Model Law on Competition.

(c) "Mergers and acquisitions" refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.

16.Defining the type of transactions that shall be subject to control by a competition authority is crucial for the scope of a competition law's merger control provisions. The Model Law chose to define "mergers and acquisitions" as those transactions that will be subject to merger control. Note, however, that the terminology used for the purpose of merger control varies significantly between the various competition law regimes. For further detail, see the commentaries on Chapter VI of the Model Law on Competition.

(d) "Relevant market" refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

Rationale of market definition

17.One of the key preoccupations of competition law is market power. Market power can tell an assessor any number of things about a firm, including its ability to increase prices and limit choices and productive output, thereby adversely affecting consumer welfare. Market power also places a firm in a position to exclude its rivals from the market, thereby affecting the level of competition in that market. Therefore, as it is necessary to establish market power to test the ability of a firm to act unconstrained on the market, a natural precursor to that objective has to be to understand what is the market, who are its players – buyers, sellers, end customers – and what are the goods and substitutes products that are made available to consumers in that market. Identifying the relevant market or, in competition law speak, defining the relevant market helps an assessor to "define the boundaries of competition between firms"[9] and "identifies an arena of competition and enables the identification of market participants and the measurement of market shares and market concentration".[10]

18.A key point to discern from the various efforts of agencies in defining market power is that defining the relevant market is not the end game; it is a key to unlocking other competition law tools used to test the level of competition on a market. For example, in the case of a merger, defining the relevant market is a precursor to testing the level of competition that the post-merger market is likely to face. In an abuse of dominance case, it is done as precursor to assess the ability of a firm to act unconstrained in the market; and in the case of an anti-competitive agreement case, it is used as precursor to testing whether the agreement has the ability to restrict competition. Therefore, defining the relevant market leads an assessor to unlock concepts such as "market power", the "area of effective competition", the "market's size", the "product market", "the geographic boundaries of the market" and the "degree of concentration".

Market definition technique

19.As mentioned above, the relevant market frames the environment in which competition actually takes place. For the purpose of defining the relevant market, Chapter II (1) (d) of the UNCTAD Model Law on Competition requires a determination of the specific products of the relevant competitive activities, as well as of the geographic territory where such activities take place. This distinction between the relevant product market and the relevant geographic market is commonly accepted. The criteria for establishing both dimensions of the relevant market are based on the concept of demand-side substitutability.

The relevant product market

20.In order to determine the relevant product market, it is therefore necessary to establish whether the products in question are substitutable from the demand side perspective. In practice, two closely related and complementary tests have been applied in the identification of the relevant product/service market, namely the reasonable interchangeability of use and the cross elasticity of demand. In the application of the first criterion, two factors are generally taken into account, namely, whether or not the end use of the product and its substitutes are essentially the same, or whether the physical characteristics (or technical qualities) are similar enough to allow customers to switch easily from one to another. In the application of the cross elasticity test, the price factor is central. It involves inquiry into the proportionate amount of increase in the quantities demand of one commodity as a result of a proportionate increase in the price of another commodity. In a highly cross elastic market, a slight increase in the price of one product will prompt customers to switch to the other, thus indicating that the products in question compete in the same market, while a low cross elasticity would indicate the contrary, i.e. that the products have separate markets.

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[9] European Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, O.J. 1997 C372/5, [1998] 4 CMLR 177.

[10] United States Federal Trade Commission and United States Department of Justice Joint Draft Revised Horizontal Merger Guidelines, Released for Public Comment on 20 April 2010. Available at http://www.ftc.gov/os/2010/04/100420hmg.pdf.

21.In other words, the pertinent question is whether the consumers of a specific product would switch to readily available substitutes in response to a hypothetical small (in the range of 5 to 10 per cent), but permanent relative price increase in the products and areas being considered. This test is called the hypothetical monopoly test or the SSNIP test (**S**mall but **S**ignificant **N**on-transitory **I**ncrease in **P**rice).

22.To determine, for instance, whether apples and pears belong to the same relevant product market, a competition authority would have to assess whether customers would switch from buying apples to buying pears if the price for apples rose 5 per cent on a permanent basis. If it came to the conclusion that customers would indeed switch to buying pears, apples and pears would belong to the same relevant product market. If, however, it found that customers would continue buying apples despite the price increase, only apples would form the relevant product market.

23.Although demand-side substitutability is the paramount criteria for defining the relevant market, a competition authority may also have to assess supply-side substitutability under certain circumstances. Supply-side substitutability is given when consumers do not consider certain products as substitutes, but when producers could easily switch the production of these goods to substitutable products. For instance, consumers may not consider sparkling and flat bottled water as substitutes. However, producers can switch their production easily from one product to the other according to changes in demand or price. Therefore, it is appropriate to define the relevant market as the market for bottled water that includes both sparkling and flat water.

The relevant geographic market

24.The geographic market is the second element that must be taken into account for determining the relevant market. It may be described broadly as the area in which sellers of a particular product or service operate. It can also be defined as one in which sellers of a particular product or service can operate without serious hindrance.[11] The relevant geographical market may be regional, national or international in scope. On the regional level, it is possible to consider single towns or even certain parts of them, as well as a cluster of towns, a province or federal state, or a region consisting of a number of provinces/federal states.

25.The definition of the relevant geographic market is based on demand-side considerations as well. The relevant geographic market is the area in which the reasonable consumer or buyer usually covers his demand. The relevant question to define the geographic scope for the retail grocery markets, for instance, would be: will consumers switch from the supermarket near by to a supermarket in another area of town, if the nearby supermarket increases its prices 5 per cent on a permanent basis?

26.A number of factors are involved in determining the relevant geographic market, including price disadvantages arising from transportation costs, degree of inconvenience in obtaining

[11] Producers might, by anti-competitive agreement, avoid operating in particular areas and that would not be a reason for defining a geographical market narrowly (comment transmitted by the Government of the United Kingdom).

goods or services, choices available to consumers, and the functional level at which enterprises operate.

Alternative approaches in existing legislation – Definition of relevant market

<table>
<tr><th>Country</th><th></th></tr>
<tr><td>China</td><td>In China, according to Article 12 of the Anti-monopoly Law of the People's Republic of China, relevant market "refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services".

In addition, according to Article 3 of "Guidelines Regarding the Definition of Relevant Market" issued by the Anti-monopoly Committee, "relevant market" also considers time or innovation, when involving intellectual property.</td></tr>
<tr><td>India</td><td>In the Indian Competition Act, 2002, Section 2 (r, s, and t), relevant market is defined as follows:

(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas;

(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason or characteristics of the products or services, their prices and intended use […].

As regards "relevant product market", the Indian Competition Act considers the following factors (Sec. 19 (7)):

a. physical characteristics or end-use of goods;
b. price of goods or services;
c. consumer preferences;
d. exclusion of in-house production;
e. existence of specialized producers;
f. classification of industrial products.

For determining the "relevant geographic market", the Indian Competition Act considers the following factors (Sec. 19 (6)):

a. regulatory trade barriers;
b. local specification requirements;
c. national procurement policies;
d. adequate distribution facilities;
e. transport costs;
f. language;</td></tr>
</table>

Country	
	g. consumers preferences; *h.* need for secure or regular supplies or rapid after-sales services.
Kazakhstan	Law No.144 of 19 January 2001 of the Republic of Kazakhstan concerning Competition and Restriction of Monopoly Activities, Article 4.13. "Commodity market" shall mean a sphere of circulation of goods, those which have no substitutes or of mutually replaceable goods (work, services), to be determined on the basis of the economic possibility and also territorial and technological possibility of buyers to purchase such goods (work, services).
Ukraine	Law of Ukraine on the Protection of Economic Competition, 11 January 2001, No. 2210-III, Article 1. "Market of a product (product market)" denoting the sphere of turnover of a product (intersubstitutable products) for which there is demand and supply for a certain time and within a certain territory.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

Introduction

27.Giving guidance for best practice in competition law design, the Model Law on Competition suggests that the law should have general applicability – to all industries, agreements and entities engaged in the commercial exchange of goods and services. However, it is true that there may be economic, legal and sometimes political reasons for limiting the general applicability of a competition law and it is these types of rationale, which dictate the scope of competition legislation.

28.The scope of competition law is typically the product of policy, based in historical and cultural circumstances, and economic objectives as defined by governments (sometimes under influence of the interest groups or other policy shapers). It develops over time as challenges are encountered while enforcing the law. The issues discussed below may determine the scope of competition legislation:

29.The approach taken by policymakers and legislatures to the rules that govern a certain sector of the economy are driven by political ideals held about the proper functioning of a system of government. For example, it has been observed that the need to ensure plurality and diversity of views, which is the hallmark of a well-functioning democracy, is one of the chief results of the United States' antitrust stance on undue concentration in the media industry.[12] Thus, the Newspaper Preservation Act was passed in the 1970s when many "two-market newspaper towns" faced the danger of losing their second voice. That law was passed to

[12] The same consideration influences the design of German and United Kingdom competition law.

exempt certain joint operations of newspapers from antitrust scrutiny in order to preserve small town newspapers in economic distress.[13]

30.For many regions, it is a mix of the geography, economics, demography and politics which influences, guides and shapes the competition law and policy for that region.

31.The Revised Treaty of Chaguaramas, which is the treaty governing competition law for the Caribbean Community (CARICOM) region, may serve as an example in this respect. Respecting that the Caribbean Community is a "Community of Sovereign States", its provisions are drafted to allow each member State to limit or delimit the scope of competition law for certain classes of economic activity as warranted by the level of economic development of each of the member States.[14]

32.A general observation of competition laws when they are first enacted suggests that they are drafted broadly and then, as the laws are tested in specific areas of the economy, they are clarified by the judiciary or amended by the lawmaker to respond to lobbying efforts of special interest groups or business people. For example, in the 1970s Canadian competition laws did not apply to the service sectors, commercial banks, professional bodies or airlines. In the United States, too, in the 1970s, at least 16 different areas of law were exempted from the purview of United States antitrust law, including insurance, transportation, energy and professional baseball. In Europe, until recently, the insurance sector enjoyed, first, two individual exemptions and, later, a very broadly crafted block exemption, both of which were designed in the 1990s to allow for the "enhanced need for cooperation" created by the "special" nature of the insurance sector.[15] As a matter of general process, legislatures typically engage in heavy consultation with stakeholders in the sectors to be affected by the law, and also consumer protection groups, before crafting exemptions. Further, while lobbying may move legislatures or policymakers to review and narrow the law, it is also true that lobbyists and counter lobbyists, responding to ever-changing economic conditions, are responsible for moving lawmakers to review the scope of exemptions that are granted for sectors and types of economic activity.

33.Many competition law regimes are adopted with no way of knowing how they will subsequently develop. In most cases, the law develops when case law illustrates the many challenges posed by the law and the legislature reacts to correct any errors or misjudgments made when drafting the legislation. Sometimes, the system initially used to apply and enforce the law in a certain way is later viewed as outdated by many stakeholders; many errors in judgment become manifest only as time passes.

34.For example, for 40 years the European Commission applied a system of notification and authorization for agreements that fell within then Article 81(1) of the EC Treaty.[16] Under a system set up by secondary legislation in 1962, an agreement entered into by parties that fell

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[13] See UNCTAD (2002). Application of Competition Law: Exemptions and Exceptions. UNCTAD/DITC/CLP/Misc.25.

[14] See Chapter VIII of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy.

[15] http://ec.europa.eu/competition/sectors/financial_services/insurance.html

[16] Now Article 101 of TFEU.

within the former Article 81(1) of the EC Treaty would be void and not enforceable in a court of law, unless it was notified to the European Commission and granted an exemption pursuant to former Article 81(3) of the EC Treaty. The Commission had the sole and exclusive power to grant exemptions and, owing to the vulnerable economic position that firms found themselves in – not knowing whether their agreement would be enforceable or not – exorbitant numbers of agreements were filed with the Commission. In the period between 1962 and 1968, over 36,000 agreements were filed with the Commission, placing a tremendous burden on its resources and skewing its monitoring and enforcement priorities in a way which left many pernicious offenses to escape the notice of the European Commission. Still, the system saw some advantages in that it brought uniformity, certainty and a "culture of competition" to the European Community. Nevertheless, in 1999 the Commission adopted a White Paper on the modernization of the European Community competition law rules, which illustrated the many problems posed by a notification and authorization system that gave sole and exclusive power to the Commission to enforce the former Article 81 of the EC Treaty. The paper also highlighted the changes and corrections that should be made to the system. The EU's Modernization Regulation, which abandoned individual authorizations by the Commission, was born of the views formed in the White Paper.[17] The decentralized enforcement regime and legal exception system for Article 81 agreements that now exist in the EU can be said to have come as a result of 40 years of trial and error.

Different dimensions of the scope of application

35. Different dimensions that define a competition law's scope of application include the following aspects: Who are the addressees of the law (subjective scope of application)? What is the subject matter of the law, e.g. commercial activity as opposed to non-profit activity and sovereign acts of States (objective scope of application)? Where does the law apply (territorial scope of application)? When does the law apply (temporal scope of application)? In case of regional competition law regimes, an additional question relating to the jurisdictional interface between regional and national competition law arises.

Subjective scope of application

36. As mentioned previously, the subjective scope of application of a competition law depends on the definition of its addressees. The unifying theme among the legislation in many countries appears to be the effect the activity has in the marketplace, and *not* whether the actor is a legal entity, a public body or a natural person. It is the question of identifying whether the actor is engaged in "economic activity", "commercial exchange of goods and services" or "profit-making" activities. This is particularly important where activities of unincorporated businesses is economically important, e.g. in the informal sector.

37. Furthermore, the Model Law on Competition suggests that a competition law shall apply "*to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.*" The same approach is taken by European competition law, according to which

[17] White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, COM(99) 101 final, 28 April 1999.

natural persons may be classified as undertakings without being incorporated as a personal corporation if they are independent economic actors on markets for goods or services.[18] On this basis, lawyers, doctors and architects were classified as undertakings within the meaning of European competition law.

38.The scope of application has also been clarified to exclude the sovereign acts of local governments, to whom the power to regulate has been delegated, and to protect the acts of private persons when their conduct is compelled or supervised by governments. It should be mentioned, however, that in section B (7) of the Set of Principles and Rules and in most countries having modern competition legislation, the law covers State-owned enterprises in the same way as private firms. For instance, in Kenya, section 73 of the Kenyan Competition Act applies to State corporations but provides also for exemptions under section 5 of the Act. In Spain, Article 2 of the Competition Act provides for its full application with respect to situations of restricted competition which are derived from the exercise of administrative powers or which are caused by the actions of the public authorities or State-owned companies, unless the conduct in question results from the application of a law. In Algeria, the competition law's scope of application extends to the acts of governmental authorities when they are not acting in the exercise of the prerogatives arising from their official powers or for the fulfillment of public service objectives.

Objective scope of application

39.The competition rules are intended to protect against harmful business practices that can affect a range of economic activities irrespective of the sector or industry in which they are undertaken. Therefore, a range of activities including sports, broadcasting, international wire transfers, software development and marketing, access to telecommunications networks and mail delivery in the postal service are subject to competition laws, for example. In respect of these economic activities and across all sectors, competition laws are designed to prevent anti-competitive agreements, abusive behavior by monopolists, anti-competitive mergers and even public or State restrictions of competition.[19]

40.As stated previously, the general proposition is that competition should be applicable in a uniform and non-discriminatory manner to all entities engaged in commercial activity and to all industry sectors. This should be the case for two principal reasons. First, consistency and predictability in the application of the law are fostered and the citizenry develops trust in the institutions charged with implementing the law because of the confidence and accountability that predictability engenders when the law is applied in a uniform, fair and non-discriminatory manner. Second, the interdependent nature of economic activities will ensure that the prevailing competitive dynamic in one market will affect prices or output, for example, in another market, either because the goods or services being offered are substitutes or complements to each other or the good or service forms the productive input for another market. Even where there is no obvious link between the resources of one market and another, the distortions of one market can create a ripple effect such that many sectors of the economy are affected, for example by their differing abilities to compete for labour or capital.

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[18] See, for example, as regards Italian customs agents Case of the Court of Justice of the European Union C-35/96 *Commission v Italy* [1998] E.C.R. I-3851.

[19] Whish R (2009). *Competition Law*. Oxford University Press (6th ed.): 3.

Uniform application will likely engender a balanced outcome in terms of the economic impact the law makes.[20]

41.Nevertheless, it shall be the case that legislatures have a set of priorities that may conflict with the goals of competition law, whether they be economic development objectives, import controls, special economic preferences carved out for the local agricultural sector or investment policy restrictions governing foreign firms. Some of these priorities often lead a legislature to carve out exceptions or exemptions in competition law legislation. Generally speaking, two techniques to limit the objective scope of application of a competition law can be distinguished from one another.

42.By way of illustration, certain types of business practices/agreements may be exempted from competition law. For instance, a number of jurisdictions exempt export cartels from the application of the law given that they do not harm the domestic economy from a short-term perspective. However, it should be noted that export cartels may negatively impact on the domestic industry's competitiveness in the long run and certainly they are undesirable from a global perspective. Specific types of agreements may not only be exempted by law, but also by secondary legislation adopted by a competition authority, such as block exemptions under European competition law. Furthermore, several competition laws have provided specific provisions to govern intellectual property. However, virtually all antitrust laws treat licences of technology as "agreements" and scrutinize them for restrictions or abuses like any other agreement, except that the legal exclusivity granted by the State to inventors may justify some restrictions that would not be acceptable in other contexts.

43.In several countries, the exploitation of intellectual property rights has given rise to competition problems. In view of the competition problems arising from the exercise of copyright, patents and trademark rights, Spain, the United Kingdom and the European Union have considered it necessary to draw up specific regulations dealing with intellectual property rights in relation to competition. The United States has also adopted guidelines intended to assist those who need to predict whether the enforcement agencies will challenge a practice as anti-competitive. Some of the wording used to design the interface between intellectual property and competition law is illustrated in the table below.

Alternative approaches in existing legislation – The interface between competition law and intellectual property

Country	
Jamaica	In Section 3c of the Jamaica Fair Competition Act, it is stated that nothing in the Act shall apply to "the entering into of an agreement in so far as it contains a provision relating to the use, license or assignment of rights under or existing by virtue of any copyright, patent or trade mark".

[20] See UNCTAD (2002). Application of Competition Law: Exemptions and Exceptions. UNCTAD/DITC/CLP/Misc.25: 5.

Country	
India	In Section 3(5) of the Indian Competition Amendment Act 2007, it is stated that – with regard to the sections outlining the prohibitions governing agreements, abuse of dominance and combinations – nothing in those sections shall restrict a person's right to restrain an infringement or impose conditions to protect rights accruing to them conferred on them by: (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000).
Israel	In the Israeli Restrictive Trade Practices Law 1988, certain intellectual property agreements are deemed not to be restrictive. The language reads (Section 3): "An arrangement involving restraints, all of which relate to the right to use any of the following assets: patents, service marks, trademarks, copyrights, performers' rights or developers' rights, provided that the following two conditions are met: "(a) The arrangement is entered into by the holder of the above asset and the party receiving the right to use the above asset; "(b) If the above asset is subject to registration by law – it is so registered."
Ukraine	In the Law of Ukraine on the Protection of Economic Competition, special exemptions are made for concerted actions relating to intellectual property: Article 9 states: "The provisions of Article 6 of the present Law shall not be applied to agreements on the transfer of intellectual property rights or on granting the right to use the intellectual property to the extent of the limitation, by the agreements, of economic activities of the agreement party to whom the right is transferred unless these limitations exceed the limits of the legitimate rights of the intellectual property entity. "2. It shall be considered that limitations relating to the volume of transferred rights, the period and territory of validity of the permission to use the intellectual property object, those relating to the type of activities, the sphere of

Country	
	use, the minimal volume of production do not exceed the limits of the rights mentioned in Part 1 of the present Article.”

44.Secondly, specific industry sectors may be exempted. Very frequently, the agricultural sector is exempted from the application of competition law. Sectors where certain types of economic activities are exempted from antitrust scrutiny include the labour and transportation sector. Furthermore, industry sectors that are subject to specific regulation may be exempted from the application of the general competition law. Network industries – such as energy, water, and telecommunications – fall within this category. However, it should be noted that, whereas some countries exempt regulated industry entirely from the application of competition law, others make competition law subsidiary to sector-specific regulation. The commentaries on Chapter VII of the UNCTAD Model Law provide more information on the relationship between competition law and sector regulation.

Alternative approaches in existing legislation – Exempted industry sectors

Country	
China	According to Article 56 the Anti-monopoly Law of the People’s Republic of China, this law shall not apply to alliances or concerted actions of agricultural producers and rural economic organizations when engaging in economic activities such as production, processing, sales, transportation and storage of agricultural products.
Jamaica and Barbados	As regards labour policy, in Jamaica and Barbados, the present law exempts “collective bargaining done on behalf of employees to fix terms and conditions of employment” from the purview of the competition laws;[21] Another key point to note about both pieces of legislation is the non-static nature of the exemption section, which appears to create room for exemptions and exceptions to be created over time for “such other business or activity declared by the Minister by order subject to affirmative resolution.” (See sections 3(h) of the respective legislation.
Israel	As regards agriculture and transportation, exemptions are made in the Restrictive Trade Practices Law of Israel for: -Agreements involving restrictions which relate to domestic

[21] Jamaica Fair Competition Act, Act 9 of 1993, Section 3, and the Barbados Fair Competition Act, 2002-19, CAP.326C, Section 3.

Country	
	agricultural produce including fruits, vegetables, field crops, milk, eggs, poultry, cattle, fish and honey (see section 3(4)). - Agreements involving restrictions international air or sea transportation, or a combination of sea, air and ground transportation provided that all parties are sea or air carriers or an international association of sea or air carriers approved by the Minister of Transportation (see section 7).

Territorial scope of application

45.As much as the legislature enjoys legislative discretion with respect to the design of the contents of a law, the latter's territorial scope of application needs to respect the limits of public international law. Under the principles of public international law, it is generally acceptable for a State to exercise subject matter jurisdiction to regulate (a) conduct that is within its territory (the territoriality principle); or (b) conduct of its citizenry, which includes the activities of corporations domiciled or registered under their company/corporate laws (the principle of nationality). However, in the area of competition law, it is accepted today that the principle of territoriality does not prevent a State from having subject matter jurisdiction over acts that originate in foreign countries but which produce effects within the State's territory (extraterritorial application of competition law). This means that a State may apply its competition law to foreign-to-foreign mergers, as well as to cartels that were concluded outside its territory, but which impact on the level of prices of the respective products domestically.

46.Outside of these rules of public international law (and regional competition law principles enumerated in community competition regimes like that of the EU), no internationally agreed rules of prescriptive jurisdiction exist. The extent to which a State can apply competition law over conduct that occurs abroad is therefore solely a question of domestic law limited by the principles of public international law. This means that States may also decide not to apply their competition laws extraterritorially.

Alternative approaches in existing legislation – Territorial scope of application

Country	
United States	The United States was the first to apply its antitrust law extraterritorially when it formulated the "effects" doctrine in *United States v. Aluminum Co. of America*.[22] This doctrine was later tempered by the Foreign Trade Antitrust Improvement Act, legislation which applies to export trade and which is key to establishing extraterritorial application of

[22] *United States v. Aluminum Co. of America*, 148 F.2d 416, p. 443-45 (2d Cir. 1945).

Country	
	the Sherman Act subject matter jurisdiction. Under that legislation, a United States court will have subject matter jurisdiction over export commerce if there is a "direct, substantial and reasonably foreseeable effect" on either: (a) domestic commerce, say for example in a situation where the extraterritorial activity or the foreign agreement in question raises prices in the United States; or (b) export trade or commerce of a United States company, say for example in a situation where the activity or the agreement restricts access of United States exports to a given market (see 15 U.S.C section 6a).
EU	In respect of the EU, there is no regulatory instrument which addresses the extraterritorial application EU competition law to non-EU companies. However, the extraterritorial application of European competition law is not in doubt, as a body of case law has developed showing how the laws can be applied to non-EU activities or companies. In the EU, three separate principles appears to have developed: (a) The "economic entity" doctrine allows for subject-matter jurisdiction over a non- EU parent company that controls the conduct of its EU subsidiary.[23] (b) The "implementation" doctrine allows for agreements that are formed outside of the EU to be subject to EU jurisdiction if the agreement is implemented in the EU and it affects trade between the member States.[24] (c) The "effects" doctrine, though not an established doctrine at the level of the Court of Justice of the European Union, is a doctrine that has apparently become common usage at the Commission level.[25] This doctrine gives the European Community subject matter jurisdiction over extraterritorial activities whose effects are felt within the EU.
Germany	According to its Section 130 (2), the German Act against Restraints of Competition shall apply to all restraints of competition having an effect within the scope of application of the Act, also if they were caused outside the scope of

[23] Case of the Court of Justice of the European Union 48/69 *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619, para. 64.; Case of the Court of Justice of the European Union 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] E.C.R. 219, para. 15.

[24] Joined Cases of the Court of Justice of the European Union 89, 104, 114, 116, 117 and 125 to 129/85 "*Woodpulp*" *A. Ahlström Osakeyhtiö and others v. Commission* [1988] E.C.R. 5193, paras. 16-18.

[25] See, for example, dicta in Commission decision of 24 July 1969, *Dyestuffs*, O.J. 1969 L195/11, para. 28. Also see para.100 of the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. 2004 C101/81.

Country	
	application of the Act.
Singapore	Singapore is one country that has explicitly articulated the extraterritorial nature of its competition law in its legislation. Section 33(1) of the Singapore Competition Act 2004 extends the applicability of the competition laws to agreements entered into or conduct engaged in outside Singapore or by parties who are outside Singapore.
India	Section 32 of the India Competition Act 2002 addresses conduct taking place outside India which has an effect on competition in India. The Monopolies and Restrictive Trade Practices Commission (MRTPC) has the power to inquire into, and issue orders in respect of, agreements or combinations entered into abroad and parties associated therewith, as well as enterprises abusing their dominant positions abroad. The power exists if the agreement, dominant position or combination has or is likely to have an appreciable adverse effect on competition in the relevant market in India.
Malaysia	According to Article 3(1) of the Competition Act 2010, the Act applies to any commercial activity, both within and subject to subsection (2), outside Malaysia. Subsection (2) stipulates that in relation to the application of the Act outside Malaysia, it applies to any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia.

Temporal scope of application

47.The temporal scope of a law is defined as the period during which the law is applicable. From a policy perspective, the central issue with respect to the temporal application of competition law is the entry into force of a new regime. Depending on the broader government initiatives, it will be important to assess whether the legislation should come into force immediately or whether a period of preparation, education and general transition has to be undertaken before the law comes into force. This transition period allows the general citizenry and businesses in particular to become familiar with the legal regime and to learn how it will affect their economic activities. Generally, legislative drafting techniques that can be used to phase-in the law include transitional provisions, savings clauses, repeals, “sunset” provisions and other tools that limit or delay the general applicability of the law or various provisions in the law.

48.For example, Chapter VIII of the Revised Treaty of Chaguaramas which enumerates the CARICOM law on Competition Policy and Consumer Protection contains a clear recognition that a phase of preparation and rule transition in the wider legislative landscape for each Member State will have to take place in order to ensure consistency and compliance with the

Revised Treaty. Article 170(1)(b) of the Treaty is one of a number of provisions that directs member States to take implementation measures. It states that the member States shall:

> "Take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;
>
> "Provide for the dissemination of relevant information to facilitate consumer choice;
>
> "Institute and maintain institutional arrangements and administrative procedures to enforce competition law; and
>
> "Take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis."

49.In other respects, prior to the adoption of competition law, a general audit and review of the existing regulatory regimes and the prospective ones that are on the horizon should be assessed in order to judge how these rules contradict or complement the competition law regime.

Jurisdictional interface between regional and national competition law

50.Several regional and supranational organizations have adopted competition rules in addition to the national competition laws of their member States. Hence, the question arises: Which type of situation is governed by regional competition rules and which type of situation is governed by national competition laws? Furthermore, the respective enforcement competences of regional and national competition authorities need to be clearly defined in order to prevent jurisdictional conflicts.

51.Approaches with respect to these two questions vary between regional organizations.

Alternative approaches in existing legislation – scope of application of regional and national competition rules

Regional organization	
European Union (EU)	Substantive provisions of European competition law apply directly in all EU member States when the conduct in question may affect trade between member States, see e.g. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. The criterion of "EU dimension" is also decisive for the competence of the European Commission, as enforcement body of European competition law. If anti-competitive conduct does not have an EU dimension, it falls within the

Regional organization	
	competence of national competition authorities. If it has an EU dimension, the European Commission and national competition authorities have parallel competences. The Commission Notice on cooperation within the Network of Competition Authorities sets out principles for the exercise of jurisdiction in this event. In the field of merger control, the European Commission has exclusive jurisdiction over concentrations that have EU dimension.
Economic and Monetary Community of Central Africa (CEMAC)[26]	Similar to the EU model, CEMAC competition law applies to anti-competitive practices affecting trade between member States. The Competition Monitoring Body, which includes the Executive Secretariat and the Regional Competition Council, monitors the implementation of the community law.
Common Market for Eastern and Southern Africa (COMESA)[27]	The COMESA Council of Ministers adopted Competition Regulations and Rules (Regulations) in December 2004. COMESA encourages its member States to enact domestic competition laws. The regional law addresses cross-border competition issues affecting the common market. In this respect, the COMESA competition regime is similar to that of the EU. COMESA Regulations cover mergers and acquisitions, and anti-competitive business practices, including abuse of dominance. They also cover consumer protection, which is a deviation from the common formulation of regional/community competition rules. COMESA Regulations provide for the creation of two institutions for enforcement of the provisions, the COMESA Competition Commission and the Board of Commissioners. On competence sharing, the commission has a supranational position vis-à-vis the national competition authorities in competition cases. When the commission receives an investigation request concerning an anti-competitive conduct taking place in a member State, it can resolve the case in various ways. It can order the enterprise concerned to take a specific course of action. The commission may apply to the relevant national court for an appropriate order if the enterprise fails to comply within a specific time period.
Andean Community[28]	The Andean Community approved decision 608 on Rules for the Protection and Promotion of Competition in the Community in March 2005, which applies to anti-competitive practices and abuse of dominance. Article 5 of decision 608 covers:

[26] See report by the UNCTAD secretariat "The attribution of competence to community and national competition authorities in the application of competition rules", 23 May 2008 TD/B/COM.2/CLP/69.

[27] Ibid.

[28] Ibid.

Regional organization	
	(a) Anti-competitive practices occurring and having effects within the territory of one or more member States, except those which originate from and affect only one country; and (b) Anti-competitive practices originating from a non-community country and affecting two or more community members. This implies that the community law can only be applied in cases where two or more countries are involved. National competition authorities have jurisdiction over all other cases. The Andean Community secretariat is the investigative arm of the community. Investigations are carried out jointly by regional and designated national authorities under the supervision of the Andean Community. The Committee on the Protection of Free Competition is the adjudicative arm of the Andean Community, and is composed of high-level representatives from member States. The judicial arm of the community is the Andean Community Tribunal of Justice. On competence allocation, both national and community institutions have responsibilities. In member States where there is no competition law, the designated authority assumes jurisdiction on the enforcement of community law. In the Plurinational State of Bolivia and Ecuador, where there is no competition law, decision 608 applies. The Ministry of Trade and Exports of the Plurinational State of Bolivia and the Ministry of Industry and Competitiveness in Ecuador are the designated authorities.

Definitions and scope of application

I. Definitions

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

(b) "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

(c) "Mergers and acquisitions" refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control, such as interlocking directorates.

(d) "Relevant market" refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

Restrictive agreements or arrangements

I. Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal:

(a) Agreements fixing prices or other terms of sale, including in international trade;

(b) Collusive tendering;

(c) Market or customer allocation;

(d) Restraints on production or sale, including by quota;

(e) Concerted refusals to purchase;

(f) Concerted refusal to supply;

(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

II. Authorization or exemption

Practices falling within paragraph I, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit.

COMMENTARIES ON CHAPTER III AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS

Introduction

1. Chapter III of the Model Law on Competition recommends the prohibition of "restrictive agreements or arrangements." The article has been drafted based upon Section D, paragraph 3, of The United Nations Set of Principles and Rules on Competition, which reads as follows:

> "Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
>
> (a) Agreements fixing prices, including as to exports and imports;
> (b) Collusive tendering;
> (c) Market or customer allocation arrangements;

(d) Allocation by quota as to sales and production;
(e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;
(f) Concerted refusal of supplies to potential importers;
(g) Collective denial of access to an arrangement, or association, which is crucial to competition."

2. The current wording of Chapter III – "agreements between rival or potentially rival firms" – suggests that the prohibition of anti-competitive agreements concerns only horizontal agreements. However, taking into account that many competition legislations prohibit both anti-competitive horizontal and vertical agreements, the commentaries on Chapter III will also deal with vertical agreements.

Agreements or arrangements

3. As opposed to single-firm conduct, the prohibition of anti-competitive agreements is concerned with competitive harm, which results from collusion or cooperation of two or more independent companies. The interaction between companies is reflected by the notion of an agreement or arrangement. The concept of "agreement" in competition legislation is not necessarily the same as used by the civil law of a country and the term is usually interpreted in a broad way to include all kinds of relevant behaviour.

4. An agreement can take many forms. It can be written or oral, formal or informal. Even with a knowing wink, an agreement can be reached.[29] A number of competition laws are, therefore, drafted broadly to apply to all forms of agreements. In a similar vein, competition laws apply to any agreement, whether or not it is intended to be legally binding. Often, concerted practices, more informal understandings, can be covered by the prohibition of anti-competitive agreements.

5. Reflecting the fact that trade associations can play a crucial role in forming and maintaining agreements, many competition laws include decisions by trade associations in the definition of an agreement. Alternatively some jurisdictions, for instance the Republic of Korea and Malawi, have separate provisions to deal with unlawful behaviour conducted by trade associations.

6. It should be noted that an agreement between firms under common ownership or control is generally not covered by the prohibition of anti-competitive agreement. Firms under common ownership or control are considered to form a single economic entity that acts as one single market player. This concept is also reflected in section D, paragraph 3, of the United Nations Set of Principles and Rules on Competition, which states that anti-competitive agreements between enterprises are prohibited, "except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other".

7. As opposed to anti-competitive agreements and concerted practices, the concept of collective or joint dominance may be found in some jurisdictions. The concept involves multiple firms but is intended to deal with oligopolistic behaviour, i.e. parallel behaviour within an oligopoly,[30] which lacks any form of agreement or understanding.

[29] *Esco Corp. v. United States*, 340 F.2D 1000, 1007 (9th Cir. 1965).

[30] Whish R (2009). *Competition Law*. Oxford University Press. 6th ed.

Alternative approaches in existing legislation – Notion of agreement

Country	
European Union	"Agreements between undertakings, decisions by associations of undertakings, and concerted practices" (Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)).
India	"'Agreement' includes any arrangement or understanding or action in concert, (a) whether or not such arrangement, understanding or action is formal or in writing; or (b) whether or not such arrangement, understanding or action is intended to be enforceable" (Competition Act 2002, Section 2).
Jamaica	"Any agreement, arrangement or understanding whether oral or in writing or whether or not it is intended to be legally enforceable" (The Fair Commission Act, Article 2).
South Africa	"AN AGREEMENT BETWEEN, CONCERTED PRACTICE BY, FIRMS OR A DECISION BY AN ASSOCIATION OF FIRMS" WHERE AN AGREEMENT INCLUDES "A CONTRACT, ARRANGEMENT OR UNDERSTANDING, WHETHER OR NOT LEGALLY ENFORCEABLE" AND A CONCERTED PRACTICE MEANS "COOPERATIVE, OR COORDINATED CONDUCT BETWEEN FIRMS, ACHIEVED THROUGH DIRECT OR INDIRECT CONTACT, THAT REPLACES THEIR INDEPENDENT ACTION, BUT WHICH DOES NOT AMOUNT TO AN AGREEMENT" (THE COMPETITION ACT, ARTICLE 1).

Distinction between horizontal and vertical agreements

8. Agreements among enterprises are basically of two types, horizontal and vertical. Horizontal agreements are those concluded between competitors, where the term "competitor" means firms operating at the same functional level of the production or distribution chain to compete for the same customers. An agreement between potentially competing firms can also form a horizontal agreement. Potential competitors are firms that are capable and likely to enter the relevant market and which can put competitive constraints on actual competitors.

9. Vertical agreements are those between enterprises at different functional levels of the production and/or distribution chain. In other words, they are agreements between suppliers and their customers, such as between manufacturers of components and manufacturers of products incorporating those components, between producers and wholesalers, or between wholesalers and retailers. Particular agreements can have both horizontal and vertical aspects.

10.The main distinction between these two types of agreement is that, while horizontal agreements, especially ones to raise prices and restrict output, are harmful to competition in most cases, vertical agreements usually pose less threat to competition, and may often be beneficial from an efficiency perspective. Based on this finding, many jurisdictions apply different legal standards to the assessment of horizontal and vertical agreements, generally treating horizontal agreements more strictly.

Formulating the prohibition of anti-competitive agreements

11.While most competition laws prohibit both anti-competitive horizontal and vertical agreements, jurisdictions often take different approaches in formulating the prohibition. In many competition law systems, a general provision of anti-competitive agreements covers both horizontal and vertical agreements. For instance, in the United States, the competition law contains a broad prohibition of anti-competitive agreements, so that both horizontal and vertical agreements can be challenged under the same prohibition.

12.Alternatively, some competition laws – e.g. in Costa Rica, Indonesia and South Africa – have separate provisions for vertical and horizontal agreements. Furthermore, competition laws can contain general provisions concerning only anti-competitive horizontal agreements, leaving vertical agreements to be covered by a number of individual provisions dealing, for example, with resale price maintenance, exclusive dealing, tying and bundling, etc. It should be noted that, the prohibition of an abuse of dominance can also apply to vertical agreements when one party to the vertical agreement holds a dominant position, and abuses this position by anti-competitive terms and conditions.

13.A related issue is whether to explicitly specify types of prohibited conduct in the law or to draft a broad prohibition covering various forms of anti-competitive agreements. As noted above, some competition laws only contain a broad prohibition against anti-competitive agreements, leaving specific conduct prohibited by the law to be determined through the enforcement practice. While this approach allows for flexibility in the enforcement, it may lack guidance for the public, especially in young competition regimes where public awareness about the unlawfulness of anti-competitive agreements is relatively low.

14.An alternative is to include a list of examples of prohibited conduct in the prohibition of anti-competitive agreements. Many jurisdictions take an approach where a broad prohibition of anti-competitive agreements is followed by a non-exhaustive list of categories considered as violations. This approach provides a great deal of flexibility, while giving guidance as to enforcement priorities.

Alternative approaches in existing legislation – Formulating the prohibition of anti-competitive agreements

Country	
United States	"Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal" (The Sherman Act, Section 1).
European Union	"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and

Country	
	which have their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts" (Article 101(1) of the TFEU).
South Africa	**"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a *horizontal relationship* and if it involves any of the following restrictive horizontal practices:** **i. directly or indirectly fixing a purchase or selling price or any other trading condition;** **ii. dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or** **iii. collusive tendering"** "AN AGREEMENT BETWEEN PARTIES IN A *VERTICAL RELATIONSHIP* IS PROHIBITED IF IT HAS THE EFFECT OF SUBSTANTIALLY PREVENTING OR LESSENING COMPETITION IN A MARKET" (COMPETITION ACT, ARTICLE 4 & 5).
Canada	The Competition Act contains two prohibitions of anti-competitive horizontal agreements: Section 45 specifically prohibits agreements between competitors to fix prices, allocate markets or restrict output which constitute straight-forward restraints of competition, while Section 90.1 prohibits other forms of horizontal agreements where they are likely to substantially prevent or lessen competition. In addition, the Act contains several provisions that prohibit specific forms of vertical agreements, e.g. resale price maintenance (Section 76), exclusive dealing, tying and market restriction (Section 77).

Horizontal anti-competitive agreements

15.Among horizontal agreements, a distinction between so-called hard-core cartels and other types of anti-competitive agreements can be useful for setting enforcement priorities and standards of analysis.

16.The agreements, which are listed in Chapter III of the UNCTAD Model Law of Competition, constitute so-called hard-core cartels, which have proven to be particularly harmful to competition. It is widely accepted that hard-core cartels are always anti-competitive and that they could be reasonably presumed to be illegal without further inquiry.[31] For this reason, a large number of competition law regimes prohibit them outright, as *per se* violations of the law or anti-competitive by object.

17.As opposed to hard-core cartels, other types of agreements between competitors may produce some benefits. For example, joint marketing that enables products to reach customers more quickly and efficiently can produce some efficiency gains. However, these types of agreements may also harm competition by reducing the ability or incentive of participating firms to compete independently or by entailing or facilitating anti-competitive agreements between them. The overall effect on competition varies case by case, depending on the nature of agreements and the market circumstances. Therefore, these types of potentially anti-competitive agreements require more careful treatment, commonly subject to the rule of reason test under which competition authorities must demonstrate the harmful effect of alleged cartel conduct.

18.Given the recent trend of criminalization of hard-core cartels, the distinction between the two types of horizontal agreements becomes even more important. In some jurisdictions, hard-core cartels are considered to be a criminal offence and punishable by imprisonment, while other types of collaborations between competitors are subject to civil or administrative sanctions.

Hard-core cartels

19.As mentioned earlier, hard-core cartels are anti-competitive agreements between competitors with no other purpose or effect than to raise prices or reduce output. Four types of agreements generally fall within the definition of hard-core cartels: pricing fixing, output restriction, market allocation and bid rigging.

[31] The United States Supreme Court has held that "there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have cause or the business excuse for this use" (*Northern Pacific Railway Co. v. United States*, 356 US 1 (1958)).

20.Group boycotts by businesses may also fall within an expanded list of hard-core cartels. Chapter III of the Model Law on Competition includes a subcategory of group boycotts as hard-core cartels; concerted refusals to purchase or supply, and collective denial of access to an arrangement, or association, which is crucial to competition.[32]

21.As mentioned earlier, the agreements listed in Chapter III of the Model Law are generally considered as hard-core cartels.

(a) Agreements fixing prices or other terms of sale, including in international trading

22.The Set of Principles and Rules, in paragraph D.3.(a) calls for the prohibition of "agreements fixing prices, including as to exports and imports." Price fixing is among the most common forms of cartel conduct and, is considered as a *per se* violation in many countries.

23.Price fixing involves any agreement among competitors to raise, fix or otherwise maintain the price for a product or service. Price fixing can include agreements to establish a minimum price, to eliminate discounts, or to adopt a standard formula for calculating prices, etc. Price fixing applies not only to prices, but also to other terms of sale that affect prices to consumers, such as shipping fees, warranties, discount programs, or financing rates.

(b) Collusive tendering

24.Collusive tendering is the way that conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions.

25.Collusive tendering may take many forms. Competitors may agree to take turns being the winning bidder. Some competitors may agree to submit unacceptable bids to cover up a bid-rigging scheme. In other cases, competitors may simply agree to refrain from bidding or withdraw a submitted bid. Such agreements may involve subcontracting parts of the main contract to the losing bidders in exchange, or making payments to the other members of the cartel.

26.Collusive tendering is illegal in most countries. Even countries that do not have a competition law often have special legislation on tenders. Most countries treat collusive tendering more severely than other horizontal agreements, because of its fraudulent aspects and particularly its adverse effect on government purchases and public spending.

[32] Typically consumer boycotts could not be caught by such prohibitions.

Alternative approaches in existing legislation – collusive tendering

Country	
China	According to Article 15 Law of the People's Republic of China's Law for Countering Unfair Competition, tenderers shall not submit tenders in collusion with one another to force the tender price up or down. Furthermore, a tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition.
Germany	There are no special provisions concerning collusive tendering in the competition law. However, bid-rigging is specifically prohibited by German criminal law. See paragraph 298 of the Criminal Code.
Kenya	Collusive tendering or collusive bidding at auction sale is considered a criminal offence punishable by up to three years imprisonment (The Restrictive Trade Practices, Monopolies and Price Control Act, Section 11 & 12).

(c) Market or customer allocation;

27.Market and customer allocation agreements are agreements in which competitors divide markets among themselves. These agreements are essentially agreements not to compete; "I won't sell in your part of the market if you don't sell in mine". In such schemes, competing firms may divide sales territories on a geographic basis or assign specific customers or types of customers to specific members of the cartel.

28.Customer allocation arrangements can occur both in domestic and international trade; in the latter case they frequently involve international market divisions on a geographical basis, reflecting previously established supplier-buyer relationships. Firms engaged in such schemes often agree not to compete in each other's home market.

(d) Restraints on production or sales, including by quota;

29.Restraints on production or sales, so-called output restrictions, aim to affect prices by artificially limiting supply.

30.Output restrictions can involve agreements on production volumes, sales volumes, or percentages of market growth. Such restrictions are often applied in sectors where there is surplus capacity and the parties to the collusion want to raise prices. In order to enforce this scheme, a pooling arrangement is often created whereby firms selling in excess of their quota are required to make payments to the pool to compensate those selling below their quotas.

(e) Concerted refusals to purchase;
(f) Concerted refusal to supply;

31.Concerted refusals to purchase or to supply, so-called group boycotts, are agreements between competing firms not to do business with targeted individuals or businesses. Group boycotts may be used to implement an illegal anti-competitive behaviour. For instance, in order to enforce price fixing agreements, competing firms may agree not to do business with others except upon agreed terms. In other instances, group boycotts can be employed to prevent a firm from entering a market or to disadvantage an existing competitor. Or they may target price discounters in order to enforce resale price maintenance arrangements.

32.Group boycotts may be either horizontal (i.e. competing firms may agree among themselves not to sell to or buy from targeted businesses or individuals) or vertical (involving agreements between parties at different levels of the production or distribution chain, refusing to deal with a third party, normally a competitor to the firms involved in the agreement).

33.Group boycotts are considered illegal in a number of countries, particularly when they are designed to enforce other arrangements or when they restrict competition and lack a business justification.

Alternative approaches in existing legislation – Boycotts

Country	
Germany	In addition to a general prohibition of anti-competitive agreements, the Act against Restraints of Competition contains a specific prohibition of boycotts (Section 21).
United States	The Supreme Court held that not all concerted horizontal refusals to deal warrant *per se* treatment. The defendant, a purchasing cooperative, had expelled a member without providing either an explanation at that time or a procedural means to challenge the expulsion. The Court found that such cooperatives typically are designed to increase economic efficiency and held that unless the cooperative possessed market power or exclusive access to an element essential to effective competition, the expulsion of the member should be judged under the rule of reason and therefore might well be lawful. (*Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.,* 472 U.S. 284 (1985)). In another case, the Supreme Court held that a group boycott designed to affect the price paid for the services of the group's members was *per se* unlawful without regard to the market power of the participants (*FTC v. Superior Court Trials Lawyers Ass'n*, 493 U.S. 411 (1990)).

(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

34.Membership of professional and commercial associations is common in the production and sale of goods and services. Such associations usually have certain rules of admittance and under normal circumstance those who meet such requirements are allowed access. However, admittance rules can be drawn up in such a manner as to exclude certain potential competitors either by discriminating against them or acting as a closed shop, which might lessen or hamper competition. Nevertheless, valid professional concerns, such as non-compliance with rules of professional conduct, can justify exclusions of individuals from professional associations.

35.Collective denial of access to an arrangement may also take the form of denying access to a facility that is necessary in order to compete effectively in the market.

Other types of horizontal agreements

36.Horizontal agreements other than hard-core cartels are often qualified as anti-competitive by effect or subject to the rule of reason. These types of agreements typically include: joint marketing, joint purchasing, R&D joint venture, and sometimes information sharing agreements.

37.As mentioned above, in many jurisdictions, these types of agreements are subject to the rule of reason test, reflecting the fact that competitors sometimes need to collaborate or cooperate in strategic alliances or joint ventures, and that such collaboration can be not only benign but pro-competitive.

38.Nonetheless, it should be noted that just labelling an arrangement as a "joint venture" is not enough to avoid *per se* liability where participants use the joint venture as a device to raise prices or restrict output.

Joint marketing

39.Joint marketing may involve agreements to jointly sell, distribute or promote goods or services. Such agreements can be pro-competitive when a combination of complementary assets can generate cost savings and other efficiencies. However, marketing collaborations can involve agreements on price, output, or other competitively significant variables, resulting in competitive harm.

Joint purchasing

40.A joint purchasing agreement is an agreement between firms to jointly purchase necessary inputs. Often joint purchasing agreements are pro-competitive, since joint purchasing can allow participants to achieve greater discounts from suppliers reflecting for example lower supply costs, or to save delivery and distribution costs. However, such agreements can lessen competition where they facilitate collusion through standardizing participants' costs.

R&D joint venture

41.Collaboration between competitors may involve agreements to jointly conduct research and development. Most joint R&D activities between competitors are pro-competitive, producing significant benefits. For instance, R&D collaboration can allow participants to combine complementary assets, technologies or know-how, leading to the development of new or improved products. Joint R&D agreements can lessen or hamper competition when they impose upon participants restrictions on the exploitation of products developed through the cooperation.

Information sharing agreements

42.Agreements may involve a considerable degree of information exchange between competitors. While the sharing of information can be necessary to achieve pro-competitive collaboration, it can sometimes increase the possibility of collusion. In particular, exchanging pricing information, costs, transaction terms, marketing strategies or other significant competitive variables may raise competitive concern and is therefore considered as per se anti-competitive in some jurisdictions. With the sharing of competitively sensitive information, competitors may facilitate collusion.

Vertical agreements

43.Vertical agreements are agreements between firms at different levels of the production or distribution chain, e.g. agreements between a producer and a distributor, between a wholesaler and a retailer. While Chapter III of the Model Law of Competition does not refer to vertical agreements, some types of vertical agreements that may be anti-competitive are mentioned under Chapter VI of the Model Law, which deals with the abuse of a dominant position. From a systematic perspective, it appears, however, more appropriate to deal with vertical agreements under the prohibition of anti-competitive agreements.

44.In many jurisdictions, vertical restraints are subject to a rule of reason approach, which reflects the fact that such restraints are not always harmful and may, actually, be beneficial in particular market structure circumstances. Non-price vertical restraints are rarely opposed by competition authorities.

45.Vertical agreements that typically raise competition concerns include: resale price maintenance, exclusive dealing, exclusive territory or territorial (geographical) market restrictions on distributors and tying arrangements. While the first has remained highly controversial among economists, exclusivity practices raise fewer concerns.

Resale price maintenance

46.A resale price maintenance arrangement may be found in an agreement among a supplier and its distributors where the supplier makes its distributors sell its products at certain prices. Generally, a resale price maintenance practice refers to the setting of retail prices by the supplier. For further information on different approaches to assess resale price maintenance, see the commentaries on Chapter IV of the Model Law on Competition.

Exclusive dealing

47.Exclusive dealing arrangements may be found in an agreement where a restriction is placed on the firm's choice of buyers or suppliers, that is to say where a buyer is required to purchase all his requirements from only one seller, or a seller is required to sell its products to only one firm. For further information on the assessment of exclusive dealing agreements, see commentaries on Chapter IV of the Model Law on Competition.

Exclusive territory or territorial market restrictions

48. This is found in an agreement by which a supplier restricts its distributors' selling territories. For further information on exclusive territorial agreements see the commentaries on Chapter IV of the Model Law on Competition.

Tying arrangements

49. A tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees he will not purchase the product from any other supplier.[33]

50. Further information on the assessment of tying agreements can be found in the commentaries on Chapter IV of the Model Law on Competition.

Authorization or exemption

51. Virtually every jurisdiction contains exemptions from anti-competitive agreement prohibition. As various jurisdictions have different forms of regimes, however, they have differing exemption and authorization systems. While Paragraph II of the present Chapter of the Model Law on Competition provides for an authorization system where national authorities are granted discretionary powers to authorize notified agreements, other legislations only provide for legal exemptions for specific types of agreements without conferring upon the competition authority a margin of discretion. For instance, United States antitrust law does not envisage any possibility of exemption or authorization by the United States competition authorities, and therefore does not provide for a notification system for anti-competitive agreements. However, there are numerous statutory and court made exemptions to the United States antitrust laws.

52. The following remarks concern different forms of authorizations that may be granted by competition authorities as opposed to legal exemptions.

Block and individual exemptions

53. Many jurisdictions provide systems for block and/or individual exemptions. With a block exemption granted, a certain category of agreements benefits from an exemption without any individual assessment. Specified categories of agreements can be assumed to satisfy the criteria for exemptions. An example is the case of R&D and specialization block exemptions, where the combination of complementary skill or assets can produce substantial efficiencies.

54. On the other hand, an individual exemption can be granted for individual cases of agreements. In order to obtain authorization, firms intending to enter into potentially anti-competitive agreements would accordingly need to notify the competition authority of all the relevant facts of the agreement. Chapter V of the Model Law on Competition deals with the procedural aspects of such a notification system.

55. As explained in more detail in the commentaries on Chapter V of the Model Law on Competition, a system of prior notification and administrative authorization may produce significant backlog of notifications, unnecessarily consuming a great deal of antitrust authorities' resources and failing to deliver legal certainty to the parties concerned. This is

[33] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

why the notification system for potentially anti-competitive agreements was abolished under EU competition law.

Criteria for granting exemptions

56.Competition authorities may authorize firms to engage in certain conduct when the firms are subject to effective competition, and such practices produce a “net public benefit”. The net public benefit needs to be aligned with the objectives or purposes of the competition laws, preferably interpreted as economic benefit or economic efficiency. In elaborating the criteria for exemptions, Article 101 (3) of TFEU can provide a good yard stick. The provision sets four conditions for an agreement to be authorized: (a) the agreement needs to contribute to improving the production or distribution of goods or to promoting technical or economic progress – so-called efficiency gains; while (b) allowing consumers a fair share of the resulting benefit; (c) the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or (d) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Several countries follow this approach taken by the EU, e.g. Switzerland.

57.Many competition authorities, including the European Commission, are reticent to authorize agreements that fall within the categories of hard-core cartels.

A de minimis *exemption or other forms of exemptions*

58.Many competition authorities grant a *de minimis* exemption from the prohibition of anti-competitive agreements for firms whose combined market share does not exceed a certain share (typically 10–25 per cent) of the relevant market or whose combined annual turnover is below a certain level. However, in general, this type of exemption does not apply to hard-core cartels.

59.In other instances, such *de minimis* exemption is granted by law. For example, German competition law does not apply to cooperation between small and medium-sized enterprises if the cooperation rationalizes economic processes.

60.In addition, some competition laws provide for possibilities of authorizing under particular circumstances and for a limited period of time, such as crisis cartels (sometimes referred to as depression cartels) and rationalization cartels.

61.Examples are the old Japanese and German anti-cartel regime, where crisis and rationalization cartels could be authorized by the competition authority upon application from the parties. In both countries, the depression and rationalization cartel exemptions were abolished respectively in 1999 and 2005. It should be noted that in other jurisdictions which still have such provisions, there are rarely exemptions in force in recent years.

Alternative approaches in existing legislation – Authorization or exemption

Country	
Viet Nam	Exemptions can be granted if an agreement satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers: (a) It rationalizes an organizational structure or a business scale or increases business efficiency; (b) It promotes technical or technological progress or improves the quality of goods and services; (c) It promotes uniform applicability of quality standards and technical ratings of product types; (d) It unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors; (e) It increases the competitiveness of small and medium-sized enterprises; (f) It increases the competitiveness of Vietnamese enterprises in the international market (Law on competition, Article 10).
Japan	There were depression and rationalization cartel exemptions which could be granted under particular circumstance and for a limited period of time. During the deregulation in the late 1990s, the exemptions were abolished.
European Union	While Article 101 (1) of TFEU prohibits anti-competitive agreements, Article 101 (3) states that the provisions of paragraph (1) may be declared inapplicable if such agreements or decisions contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit", with the provisions that they do not: "(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; "(b) Afford such undertakings the possibility of eliminating competition in respect of substantial part of the products in question".
China	According to Article 15 of the Anti-Monopoly Law of the People's Republic of China, where the business operators can prove that a monopoly agreement concluded by them falls under any of the following circumstances, the monopoly agreement shall be exempt from Articles 13 and 14 of this Law: (1) for the purpose of improving technologies, researching, and developing new products; (2) for the purpose of upgrading product quality, reducing costs, improving efficiency, unifying product specifications or standards, or carrying out professional labor division; (3) for the purpose of enhancing operational efficiency and reinforcing the

Country	
	competitiveness of small and medium-sized business operators; (4) for the purpose of realizing public interests such as conserving energy, protecting the environment and providing disaster relief, etc.; (5) for the purpose of mitigating the severe decrease of sales volume or obviously excessive production during economic recessions; (6) for the purpose of protecting the justifiable interests of the foreign trade or foreign economic cooperation; (7) other circumstances prescribed by the law or the State Council. Where a monopoly agreement falls under any of the circumstances prescribed in Items (1)–(5) and is exempt from Articles 13 and 14 of this law, the business operators shall also prove that such an agreement does not substantially restrict competition in the relevant market and can enable the consumers to share the benefits from the agreement.
Australia	The Trade Practices Act specifies when the Australian Competition and Consumer Commission (ACCC) may grant authorization. Broadly, conduct may be authorized if the public benefit outweighs any public detriment. The Act contains different tests for authorizing different types of conduct. The two different tests are as follows: The ACCC may not grant authorization for the making or giving effect to proposed or existing contracts, arrangements or understandings that might contain cartel provisions, might substantially lessen competition or involve exclusive dealing (other than third line forcing) unless it is satisfied in all circumstances that the agreement or conduct is likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition (the first test). The ACCC may not grant authorization to proposed exclusionary provisions (primary boycotts), secondary boycotts, third line forcing and resale price maintenance unless it is satisfied in all the circumstances that the proposed provision or proposed conduct is likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place (the second test).

Model Law on Competition (2010) – Chapter IV

Acts or behaviour constituting an abuse of a dominant position of market power

I. Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:

(i) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services; (ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

II. Acts or behaviour considered as abusive:

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors; (b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises; (c) Fixing the prices at which goods sold can be resold, including those imported and exported; (d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service: (i) Partial or complete refusal to deal on an enterprise's customary commercial terms; (ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; (iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported; (iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

III. Authorization or exemption

Acts, practices or transactions not absolutely prohibited by the law may be authorized or exempted if they are notified, as described in article 7, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if the affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

COMMENTARIES ON CHAPTER IV AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS

I. *Prohibition of acts or behaviour involving an abuse of a dominant position of market power*

A prohibition on acts or behaviour involving an abuse of a dominant position of market power:

(i) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;

(ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

Introduction

1. Abuse of dominance is one of the most controversial issues in competition law. The question of when to consider a company as dominant, as well as the spectrum of acts that might constitute abuse of dominance, varies from country to country, and may depend on the goals of each competition regime (consumer welfare, efficiency, protecting the competitive process) and on the inclusion or exclusion of "other" values – such as fairness – in the competition analysis. This Chapter outlines general criteria for identifying the existence of dominance. It also provides a non-exclusive list of acts that may be considered anti-competitive.

2. Dominance means significant market power. From an economic perspective, dominance is the ability of a firm (or a group of firms acting jointly) to raise and profitably maintain prices above the level that would prevail under competition for a significant period of time. The mere possession of a dominant position is not considered to be anti-competitive; nor is the acquisition of dominance through competition on the merits. However, the exercise or abuse of a dominant position may lead to (i) reduced output and increased prices; (ii) reduced quality and variety of services/products; or (iii) limitation of innovation, which would be considered as anti-competitive.

3. Competition laws handle the question of whether a company is to be considered as dominant very differently. A number of competition laws do not provide for a concrete definition of dominance, but rely on the competition authority's economic judgment. On a case-by-case basis, the competition authority will have to assess several factors that influence the determination of dominance. High market share is one indicator in favour of a finding that an enterprise is dominant in a relevant market. Nonetheless, in many jurisdictions, the sole possession of high market share is insufficient for a finding of dominance, given that some markets are characterized by a high level of competition despite having relatively few players. Other market indicators, such as barriers to entry, and actual and potential competitors, durability of high market share, buyer power, economies of scale and scope, access to upstream markets and vertical integration, market maturity/vitality, access to important inputs, and the financial resources of the firm and its competitors should, among other things, be taken into consideration.

4. Other jurisdictions provide shortcuts to proof of dominance, by using safe harbours based

on market share thresholds as a starting point for determining dominance. If an enterprise does not possess a minimum level of market share, it will not be considered dominant. If it does, the competition authority will analyse other factors – as mentioned above – to determine whether the enterprise is dominant.

5. Yet other jurisdictions presume that an enterprise is dominant past a given market share threshold. They put the burden of proving the lack of market power on the defendant once it has been shown that the firm has the requisite market share. If the defendant does not overcome this burden, it will be considered dominant.

6. The use of market share thresholds – either to establish a prima facie case and thus shift the burden of proof or to rule out dominance – enhances the efficiency of the enforcement of the competition authority and gives entrepreneurs legal certainty. Nonetheless, market share thresholds pose the risk of underemphasizing or overemphasizing market share in certain cases, leading to overenforcement or underenforcement. Therefore, it is not advisable for a competition law to stipulate irrefutably that a company is dominant when it reaches certain market share thresholds.

7. Entry and import competition are further factors to consider when determining whether an enterprise is dominant. If entry of one or more undertakings into a market is easy, any attempt by an incumbent to raise price or reduce output will be frustrated by the new entrants. Ease of entry is determined by the height of barriers to entry. For a specific analysis of barriers to entry, see box 4/1. Import competition can be considered as a particular form of entry, when foreign companies start selling competing products on the domestic market. Thus, imports can constitute an important source of competition and need to be taken into account in the assessment of dominance.

8. Regardless of the definition of dominance adopted by a competition law, the assessment of whether a company is dominant or not strongly depends on the definition of the relevant market. As a rule of thumb, the narrower the relevant market is defined, the higher the likelihood that a single player enjoys significant market power in this market. The definition of the relevant market is dealt with in more details in the commentaries on Chapter II of the Model Law on Competition.

Box 4/1

Barriers to entry in competition law and policy

Barriers to entry to a market refer to factors that may prevent or deter the entry of new firms into a market even when incumbent firms are earning excess profits. Barriers to entry can vary widely according to the level of maturity or the level of development of a market. Different categories of barriers to entry can be distinguished.

Structural barriers to entry arise from basic industry characteristics such as technology, cost and demand. There is some debate over what factors constitute relevant structural barriers. The widest definition suggests that barriers to entry arise from product differentiation, absolute cost advantages of incumbents, and economies of scale. Product differentiation creates advantages for incumbents because entrants must overcome the accumulated brand loyalty of existing products. Absolute cost advantages imply that the entrant will enter with higher unit costs at every rate of output, perhaps because of inferior technology. Scale economies restrict the number of firms that can operate at minimum costs in a market of a given size. A narrower definition of structural barriers to entry has been given by George Stigler and proponents of the Chicago school of antitrust analysis. They suggest that barriers to entry arise only when an entrant must incur costs which incumbents do not bear. Therefore, this definition excludes scale economies and advertising expenses as barriers (because these are costs which incumbents have had to sustain in order to attain their position in the market). Other economists also emphasize the importance of sunk costs as a barrier to entry. Since such costs must be incurred by entrants, but have already been borne by incumbents, a barrier to entry is created. In addition, sunk costs reduce the ability to exit, and thus impose extra risks on potential entrants.

Strategic barriers to entry refer to the behaviour of incumbents. In particular, incumbents may act so as to heighten structural barriers to entry or may threaten to retaliate against entrants if they do enter. Such threats must, however, be credible in the sense that incumbents must have an incentive to carry them out if entry does occur. Strategic entry deterrence often involves some kind of pre-emptive behaviour by incumbents. One example is the pre-emption of facilities by which an incumbent overinvests in capacity in order to threaten a price war if entry actually occurs. Tying up necessary infrastructure, such as transport or port facilities, can constitute a strategic barrier to entry, too.

Legal barriers to entry can arise from the provisions of national legal systems. Examples of legal barriers to entry include tariffs and quotas, intellectual property and trademark regulations, exclusive rights contributed by law to certain companies/statutory monopoly power, as well as further administrative obstacles to market entry.

9. To some jurisdictions, the concept of dominance refers not only to the situation where an enterprise acts unilaterally, but also to the situation in which two or more enterprises acting together have market power or have the incentive to act in lock step and together they have market power (collective dominance). This refers to highly concentrated markets, where two or more enterprises control a large share of the market, creating and enjoying conditions through which they can dominate or operate in the market very much in the same manner as would a monopolist. This criterion was adopted by the European Commission and the Court

of First Instance of the European Communities[34] in the Vetro Piano in Italia Judgment,[35] which was soon followed by the Nestlé Perrier merger case.[36] The cumulative effect of use of a particular practice, such as tying agreements, may well result in an abuse of a dominant position.

Alternative approaches in existing legislation – Finding of a dominant position

Region / Country	
Africa	
Zambia	In Zambia, under section 7 (2) of the Competition and Fair Trading Act 1994, abuse of dominant power is expressed as acts or behaviour that limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effects on trade or the economy in general. Generally, an enterprise is considered to be dominant if it has a level of market power that allows it to behave independently of competitive pressures (e.g. pricing and distribution strategies). An important but not conclusive factor in determining dominance is the share of the market of the undertaking. An undertaking is unlikely to be dominant if its market share is less than 40 per cent – although this rule will largely depend on the circumstances of the case.
Asia/Pacific	
China	According to Article 17 (2) of the Anti-Monopoly Law of the People's Republic of China, a dominant market position is defined as a market position held by business operators that have the ability to control the price or quantity of commodities or other trading conditions in the relevant market or bloc or to affect the entry of other business operators into the relevant market. Furthermore, six main factors to determine a dominant market position of a business operator are provided by Article 18: (i) the market share of the business operator and its competitive status in the relevant market; (ii) the ability of the business operator to control the sales market or the raw material supply market; (iii) the financial and technological conditions of the business operator; (iv) the extent of reliance on the business operator by other business operators in the transactions; (v) the degree of difficulty for other business operators to enter the relevant market; and (vi) other factors relevant to the

[34] Now General Court of the European Union.

[35] Comment transmitted by the EU Commission. Vetro Piano in Italia judgment of 10 March 1992.

[36] Information provided by the European Commission. "Nestlé Perrier" decision of 22 July 1992.

Region / Country	
	determination of the dominant market position of the business operator. Article 19 (1) prescribes a rebuttable presumption of dominance when an enterprise meets any one of the following conditions: (i) the market share of one enterprise accounts for half or more of the relevant market; (ii) the joint market share of two enterprises accounts for two thirds or more of the relevant market; or (iii) the joint market share of three enterprises accounts for three quarters or more of the relevant market. However, under the condition prescribed in Article 19 (1) (ii) and (iii), if any of the enterprises has a market share of less than one tenth, that enterprise shall not be considered to have a dominant market position. In addition, an enterprise that has been presumed to have a dominant market position shall not be considered as having a dominant market position if the enterprise can provide evidence to the contrary.
India	The Indian Competition Act 2002 defines “dominant position” as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. The Competition Commission of India, when inquiring whether an enterprise enjoys a dominant position or not, has due regard to all or any of these factors.
Mongolia	According to Article 3 (1) of the Law of Mongolia on Prohibiting Unfair Competition, dominance exists when a single entity acting alone or a group of economic entities acting together account constantly for over 50 per cent of supply to the market of a certain good or similar goods, products, or works carried out and services provided.
Europe (non-EU)	
Russian Federation	According to Article 5 (1) of the Russian Federation’s Federal Law on Protection of Competition of 2006, a dominant position is defined as a situation where an economic entity or several economic entities (i) have a decisive impact on the general conditions in the relevant market; or (ii) have an opportunity to remove other economic entities from this market; or (iii) can impede access to this market for the other economic entities. Article 5 (2) contains a refutable presumption of dominance if a company holds a market share exceeding 50 per cent. A company with a market share between 35 and 50 per cent may be considered as dominant, based on an economic assessment taking into account factors such as the stability of the company’s market share over time, respective market shares of the company’s competitors, and the ability of other companies to access the relevant market. Companies with a market share of less than 35 per cent may not be found dominant unless the

Region / Country	
	law provides otherwise, e.g. in the case of collective dominance or in electricity markets where en electricity generation company holding a market share of 20 per cent or less may not be found dominant.
Europe (EU)	
European Union	Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of a dominant position, without providing a definition of dominant position. In their decisional practice, the European institutions have defined dominance as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in a relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately, of consumers.[37] The Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings sets out the criteria to be taken into account by the European Commission when assessing dominance, in particular: – constraints imposed by the existing supplies from, and the position in the market of, actual competitors (the market position of the dominant undertaking and its competitors), – constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry), – constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power). It is emphasized that market shares provide a useful first indication of the market structure and of the relative importance of the various undertakings active in the market. However, the European Commission will interpret market shares in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated.
Poland	According to Article 4 (10) of the Polish Act of 16 February 2007 on Competition and Consumer Protection, a firm is presumed to hold a dominant position when its market share exceeds 40 per cent.
Czech Republic	Article 10 (1) of the Czech Consolidated Act on the Protection of Competition, one or more undertakings jointly (joint dominance) shall be deemed to have a dominant position in the

[37] See Court of Justice of the European Union case 27/76 *United Brands Company and United Brands Continental v. Commission* [1978] ECR 207, paragraph 65; Court of Justice of the European Union case 85/76 *Hoffmann-La Roche & Co. v . Commission* [1979] ECR 461, paragraph 38.

Region / Country	
	relevant market if their market power enables them to behave independently, to a significant extent, of other undertakings or consumers. According to Article 10 (3)n, unless proven otherwise, an undertaking or undertakings in joint dominance shall be deemed not to be in a dominant position if its/their share of the relevant market achieved during the period examined does not exceed 40 per cent.
Estonia	In Estonia, dominance requires that an undertaking be able to operate to an appreciable extent independently of competitors, suppliers and buyers. Dominance is presumed if an undertaking or several undertakings hold a market share of more than 40 per cent in the relevant market. Undertakings with special or exclusive rights, or in control of essential facilities, are also considered as dominant; see § 13 of the Estonian Competition Act.
Lithuania	Under the Lithuanian law on competition, a 40 per cent market share establishes a presumption of dominance. In addition, the law provides for a presumption of joint dominance when the three largest firms in a market have a collective market share of 70 per cent. Market share thresholds for the presumption of dominance are lower for retail markets; see Article 3 (11).
Germany	According to the German Act Against Restraints of Competition, an undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services in the relevant product and geographic market, it: (i) has no competitors or is not exposed to any substantial competition; or (ii) has a paramount market position in relation to its competitors. For this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, and its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings. Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions set out above. An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it: (i) consists of three or fewer undertakings reaching a combined market share of 50 per cent; or (ii) consists of five or fewer undertakings reaching a combined market share of two thirds, unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors.

Region / Country	
Spain	The Spanish competition law does not provide for a definition of dominance. According to the decisional practice of the Spanish competition authority, a company is considered dominant when it is able to behave to an appreciable extent independently of its competitors, its customers and consumers, thereby being able to adjust pricing or any other characteristics of the product or service to its own advantage.
Latin America	
Brazil	Law 8,884 of 1994 presumes that a firm has a dominant position when a company or group of companies controls 20 per cent of the relevant market. This percentage is subject to change by the Administrative Council for Economic Defense (CADE) for specific sectors of the economy (Article 20, Paragraph 3).
Colombia	Decree 2153 of 1992 defines a dominant position as the "possibility of determining, directly or indirectly, the conditions of a market". Dominant position is determined on a case-by-case basis. The law provides no thresholds.
North America	
Canada	According to Subsection 79(1) of the Canadian Competition Act, for sanctioning the abuse of a dominant position, the Tribunal must firstly find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Canadian Competition Bureau's Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) explain that substantial or complete control is understood to be synonymous with market power.
United States	In the United States, monopoly power is not defined by statute, but courts have traditionally defined it as being "the power to control market prices or exclude competition". *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 391 (1956). Market share is not the only factor considered in determining whether monopoly power exists.

II. *Acts or behaviour considered as abusive*

10. As previously mentioned, enjoying a dominant position/substantial market power is not prohibited by competition law, which means that the mere possession of a dominant position is not anti-competitive in itself, and that a dominant undertaking is entitled to compete on its merits. The prohibition on abusing a dominant position applies when a dominant undertaking uses its market power in a way that distorts competition.

11. In general, a firm abuses its dominance when it performs acts that increase its economic power and are not responsive to consumers and/or the market. Acts that serve as roadblocks to competitors and do not have offsetting advantages to consumers are examples of abuse of dominance. Some jurisdictions expand this definition of abuse of dominance to protect smaller rivals from unfair exclusions by more efficient dominant firms.

12. It is not possible to provide an exhaustive list of acts that may constitute abuse of dominance. As such, "abuse of dominance" is a concept that encompasses all those acts that fit within the definition provided in the paragraph above. Nonetheless, in order to guide enforcement practice, some competition laws provide non-exclusive lists of acts that are considered abusive and are prohibited. These behaviours may include a whole range of strategies by firms aimed at raising barriers to entry into a market. Chapter 4 (2) of the Model Law on Competition lists some examples of acts of abuse by a dominant company, which are commented on below. It should be noted that the order of the examples listed in Chapter 4 (2) does not necessarily reflect their frequency or their seriousness in terms of anti-competitive impact. It should also be highlighted that acts such as "resale price maintenance" and "parallel imports" are currently classified as vertical restraints and not as acts that constitute abuse of dominance as such. Although the acts listed are likely to be anti-competitive, this is not necessarily the case. The competition authority must undertake the analysis on a case-by-case basis to determine the effect of each practice.

13. The analytical framework that competition authorities use to assess whether certain acts of dominant undertakings constitute such an abuse of their market power has evolved over time. Today, more and more competition authorities base their decision on whether a certain practice by a dominant undertaking is to be considered abusive on a sound economic assessment (the so-called effects-based approach). Traditionally, a number of competition law regimes pursued a form-based approach, according to which the competition authority had to assess whether the behaviour under scrutiny corresponded to one of the legal examples for abusive behaviour without proceeding to a comprehensive economic assessment.

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;

14. One of the most common forms of predatory behaviour is predatory pricing, which generally refers to the act by which a company prices its products below a measure of cost. Some jurisdictions only require engagement by a company in strategic low pricing to eliminate its rivals, regardless of whether the price is below cost or not. Enterprises may engage in such behaviour to drive competing enterprises out of business with the intention of maintaining or strengthening a dominant position. The greater the diversification of the activities of the enterprise in terms of products and markets, and the greater its financial resources, the greater its ability is to engage in predatory behaviour.

15. The measure of cost in order to consider that predatory pricing exists varies among jurisdictions. Most jurisdictions agree that predatory pricing exists when products are being priced below average variable cost. However, debate exists on whether pricing below average total cost constitutes predatory pricing or not. In order to find that an abuse of dominance by predatory pricing exists, some jurisdictions require that the defendant have a reasonable prospect or "dangerous probability" of recouping the money it lost on below-cost pricing. Without recoupment, the practice of reducing prices may actually enhance consumer welfare.[38] Other jurisdictions consider that a reasonable prospect or dangerous probability of recoupment is not necessary for a finding of predatory pricing.[39] The defendant's act of selling beyond a measure of cost will suffice.

16. As low pricing usually involves benefits to consumers, jurisdictions may be reluctant to condemn pricing as predatory. Depending on the structure of its markets, jurisdictions must balance the benefits and detriments of such practices. Developing jurisdictions tend to be less reluctant to condemn predatory pricing, as their markets may be more concentrated, and as barriers to entry are high, the elimination of a smaller rival may be more problematic. On the other hand, consumers and small businesses in developing countries may derive more benefits from lower prices, leading to agencies being reluctant to intervene. Accordingly, a balance needs to be performed on a case-by-case basis.

17. Predatory behaviour is not limited to pricing. Other means, such as acquisition of goods or services in order to suspend the activities of a competitor, may be considered as predatory behaviour. Also, the refusal by an enterprise in a dominant position to supply a material essential for the production activities of a customer who is in a position to engage in competitive activities may, under certain circumstances, be considered predatory.

Alternative approaches in existing legislation − Predatory behaviour

Region / Country	
Asia/Pacific	

[38] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, Supreme Court of the United States, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed2d 168 (1993).

[39] *Tetra Pak International SA v. Commission* case T-83/91, [1994] ECR II-755. CFI aff'd Case C-333/94P [1996] ECR I-5951, Court of Justice of the European Union.

Region / Country	
Australia	Predatory pricing is covered by two provisions of the Trade Practices Act 1974 (TPA). General prohibition in subsection 46(1) TPA: Under subsection 46(1) TPA, a corporation that has a substantial degree of power in a market must not take advantage of that power in that or any other market for one of three proscribed purposes. If the corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, subsection 46(1AAA) provides that the corporation may contravene subsection 46(1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services. That is, the general prohibition in subsection 46(1) does not require recoupment to be established. The prohibition in subsection 46(1AA) TPA: Under this provision, a corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for one of three proscribed purposes. This prohibition differs from the general prohibition in subsection 46(1) in two key respects: (i) the provision is attracted if the corporation has a "substantial share" of the market rather than a "substantial degree of power", and (ii) there is no requirement that the corporation "take advantage" of its market share.
China	An example of regulations on predatory pricing appears in the People's Republic of China Law for Countering Unfair Competition of 2 September 1993. Its Article 11 states that an operator (i.e. enterprises or individuals) may not sell its goods at a price that is below cost in order to exclude its competitors from the market. The law also lists a number of cases in which low pricing practices are not to be considered as unfair, e.g. selling fresh goods, seasonal lowering of prices, changing the line of production or closing the business.
Mongolia	Article 4 (3) of the Law of Mongolia on Prohibiting Unfair Competition forbids a dominant enterprise to sell its own goods at a price lower than the cost, with the intention of impeding the entry of other economic entities into the market or driving them from the market.
Europe (EU)	

Region / Country	
European Union	According to Article 102 TFEU, directly or indirectly imposing unfair purchase or selling prices constitutes a case of abuse of a dominant position. The Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings explains how the European Commission assesses price-based exclusionary conduct, including predatory pricing. The European Commission will generally intervene when evidence shows that a dominant undertaking is engaging in predatory conduct by deliberately incurring losses or foregoing profits in the short term, to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.
Hungary	Article 21 (h) of the Hungarian Competition Act (2005) prohibits the setting of extremely low prices which are not based on greater efficiency in comparison with those of competitors and are likely to drive out competitors from the relevant market or to hinder their market entry.
Latin America	
Brazil	Law 8.884 of 1994 forbids an enterprise with a dominant position from unreasonably selling products below cost (article 20 and article 21, XVIII).
Colombia	Decree 2153 of 1992 provides that when there is a dominant position, predatory pricing will be considered abusive. The law explicitly provides that reducing prices below cost for the purpose of eliminating various competitors or preventing their entry or expansion will qualify as abuse when there is dominance.
North America	
United States	In the United States, the Supreme Court has held that two elements must be present in order to establish predatory pricing. First, the prices complained of must be "below an appropriate measure of cost", and second, the competitor charging low prices must have a "dangerous probability" of recouping its investment in below-cost prices. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. (1993). See also: *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 117 (1986). The United States Supreme Court has stated that it is important to distinguish between pro-competitive price-cutting and anti-competitive predatory pricing because "cutting prices in order to increase business often is the very essence of competition". *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

18. Although rarely anti-competitive, price discrimination – the conduct whereby a firm sells a product or service at different prices, regardless of identical costs of supplying the goods – may be a strategy to unfairly exclude competitors from the market. Charging lower prices to consumers may be a sign of competition, which is the reason why discrimination is seldom anti-competitive in an economic sense. However, price differentiation may be found to be discriminatory if there is no objective commercial justification for it. For instance, so-called loyalty discounts may lack an objective commercial justification, whereas volume discounts may be justified by economies of scale. However, it needs to be emphasized that different prices may result from the dominant company meeting the market, for instance because negotiations took place in different market situations, or one customer simply bargained harder. Therefore, the competition authority needs to carefully assess the competitive impact of price differentiation on a case-by-case basis.

19. "Loyalty discounts" are price discrimination strategies whereby a seller gives buyers a discount if they acquire a substantial percentage of their overall purchases of the relevant product from the seller over a defined reference period. These discounts may be efficient and enhance consumer welfare by reducing prices. However, in certain circumstances they can also cause anti-competitive harm when exercised by firms with market power. The link between the conditions to qualify for the discount and the reward of a lower price may result in an anti-competitive exclusionary practice. The anti-competitive effect may be related to predatory behaviour at the margin ("predation analogy") or to the leveraging of assured sales to foreclose rivals from contestable markets ("bundling analogy").[40]

20. Price discrimination also covers the situation where a firm charges the same price despite incurring different costs to supply to each customer. Examples of the latter type of price discrimination may include "delivered pricing", i.e. selling at a uniform price irrespective of location (whatever the transportation costs to the seller), and "base point selling", where one area has been designated as the base point (whereby the seller charges transportation fees from that point irrespective of the actual point of shipment and the related costs).

21. The proscription of discrimination also includes terms and conditions in the supply or purchase of goods or services. For example, the extension of differentiated credit facilities or ancillary services in the supply of goods and services can also be discriminatory.

Alternative approaches in existing legislation – Price discrimination

Region / Country	
Peru	In Peru, although the legislation considers discriminatory

[40] Padilla, A. Jorge. "The Law and Economics of Loyalty Rebates"

Region / Country	
	pricing as an example of abusive behaviour, discounts and bonuses that correspond to generally accepted commercial practices that are given because of special circumstances such as anticipated payment, quantity, volume etc., when granted in similar conditions to all consumers, do not constitute a case of abuse of dominant position (Article 10.2 (b) of the Legislative Decree 1034 approving the Law on Repression of Anti-Competitive Conduct).
Colombia	Decree 2153 of 1992 provides that when there is a dominant position, the following acts will be considered abusive: Imposing discriminatory provisions for equivalent transactions that place one consumer or supplier at a disadvantage vis-à-vis another consumer or supplier under analogous conditions; selling or providing services in any part of the country at a price different from that offered in another part of the country when the intent or the effect is to reduce or eliminate competition in that part of the country, and the price does not correspond to the cost structure of the transaction; sales to one buyer under conditions different from those offered to another buyer with the intent of reducing or eliminating competition in the market;
Australia	According to the former Section 49, subsection 1 of the Australian Trade Practices Act 1974, the prohibition of discrimination was not limited to price-based discriminations, but referred also to credits, provision of services, and payment for services provided in respect of the goods. It was also pointed out that differential terms and conditions should not be considered unlawful if they were related to cost differences. More generally, preventing firms from offering lower prices to some customers could well result in discouraging firms from cutting prices to anyone. Since Section 49 of the Australian Trade Practices Act 1974 was repealed in 1995, conduct that would have been considered prohibited under that provision is instead addressed by Section 45, if it results in a substantial lessening of competition, or by Section 46 if it is the result of the misuse of market power by a corporation.

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

22. Fixing the resale price of goods, usually by the manufacturer or by the wholesaler, is generally termed resale price maintenance (RPM). In a number of competition laws, RPM is considered as illegal per se, while other competition law regimes apply the rule of reason to RPM, given that it may also be pro-competitive. For example, RPM may be a way to promote investment in services and promotional efforts on the part of retailers, thereby controlling free riders. Nonetheless, RPM may also facilitate cartels, by assisting cartel members to identify price-cutting manufacturers.

23. In this context, it also needs to be emphasized that a number of competition laws do not classify retail price maintenance as a specific type of abuse of a dominant position, but as a particular case of anti-competitive vertical agreements.

Alternative approaches in existing legislation – Resale Price Maintenance

Region / Country	
Latin America	
Brazil	Law 8.884 of 1994 forbids an enterprise with a dominant position from "imposing on distributors, retailers and representatives of a certain product or service retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins, or any other marketing conditions related to their business with third parties" (article 20 and article 21, XI).
Europe (EU)	
European Union	EU competition law does not qualify RPM as a specific type of abuse of dominance, but as an anti-competitive feature of vertical agreements. According to Article 4 (a) of the block exemption for certain categories of vertical agreements of 2010, RPM constitutes a hardcore restriction that excludes the application of the block exemption to the vertical agreement in question. It is defined as a restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.
Sweden	In Sweden, an economic approach has been chosen concerning resale price maintenance. The setting of minimum prices with an appreciable effect on competition is covered by the prohibition against anti-competitive

Region / Country	
	cooperation as laid down in the Swedish Competition Act. However, setting maximum prices is not generally prohibited.
North America	
Canada	Formerly, Canadian competition law sanctioned resale price maintenance criminally. However, in 2009, this criminal prohibition was replaced by a civilly enforceable provision that enables the Canadian Competition Tribunal to prohibit the practice only if it has an "adverse effect on competition"; see Section 76 of the Canadian Competition Act. Note that the provision does not only apply to companies holding a dominant position, but also to any person who "(a) is engaged in the business of producing or supplying a product; (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or (c) has the exclusive rights and privileges conferred by a patent, trademark, copyright, registered industrial design or registered integrated circuit topography."
United States	In the United States, the Supreme Court has held that minimum resale price maintenance is *per se* illegal under Section 1 of the Sherman Act, but there must be an actual agreement requiring the distributor to adhere to specific prices. See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720, 724 (1988). Because maximum resale price maintenance may lead to low prices, the Supreme Court recently ruled that maximum resale price maintenance is not *per se* an offence. The court instead applied the rule of reason analysis to the conduct in that case, pursuant to which the agreement had to be analysed to determine if it was in fact anti-competitive. See: *Leegin Creative Leather Products Inc. v. PSKS Inc. dba Kay's Kloset*, 551 U.S. 877 (2007).

(d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

24. Parallel imports are the most common form of restrictions referred to in Chapter IV (II) (d) of the Model Law on Competition. Also called "grey-market" imports by those seeking to discredit them, they can be described as goods produced under protection of an intellectual

property right (e.g. trademark, patent or copyright), which are placed into circulation in one market by the intellectual property right-holder, or with his consent, and then imported into a second market without the authorization of the owner of the local intellectual property right (IPR). This owner is typically a licensed local dealer who may seek to prevent parallel imports in order to avoid intra-brand competition. Using different trademarks for the same product in different countries, thereby seeking to disguise international exhaustion and prevent imports from one another, is another example of practices captured by the above-quoted provision of the Model Law on Competition.[41]

25. The ability of a right-holder to exclude parallel imports legally from a particular market depends on the importing nation's intellectual property and competition laws. An intellectual property regime of national exhaustion awards the right to prevent parallel imports, while one of international exhaustion makes such imports legal. Under national exhaustion, exclusive distribution rights end upon first sale within a country, but this will have no effect on the existence of exclusive distribution rights in another country, giving local IPR owners in that other country the right to exclude parallel imports from the country of first sale. Under international exhaustion, distribution rights are exhausted upon first sale anywhere in the world, and parallel imports cannot be excluded.[42] Finally, under a regime of regional exhaustion, exclusive distribution rights are exhausted upon the first sale of the protected goods within a given region, enabling parallel importation within the region, but not from outside the region. In this context, it needs to be noted that all of these regimes are in line with the minimum standard[43] provided under the TRIPS agreement.[44]

26. Proponents of the prohibition of parallel imports argue that a local IPR holder who acts as a retailer with an exclusive territory is more willing to invest in customer service, pre-sales advice etc. in the knowledge that no near-rival can freeride on his efforts. In the proponents' view, these incentives would justify the ban on parallel imports.

27. Opponents of the prohibition of parallel imports are more concerned with the prohibition's negative impact on intra-brand competition. In particular, regional jurisdictions that aim at market integration, such as the European Union, therefore allow parallel imports within their common market. From this perspective, parallel imports represent an important

[41] Such practice was at the basis of Court of Justice decision 3/78 [1978] ECR 1823. In an action brought by Centrafarm B.V. against American Home Products Corporation (AHP), Centrafarm claimed that, as a parallel importer, it was entitled to sell certain drugs originating from AHP under the trade name "Seresta" in the Netherlands without authorization by AHP. The latter offered these drugs for sale in the United Kingdom under the name "Serenid D". AHP claimed an infringement of its IPR, whereas Centrafarm argued that both drugs were identical and thus AHP's IPR was exhausted upon release of the drug onto the United Kingdom market. The Court ruled that the exercise of an intellectual property right can constitute a disguised restriction on trade in the common market, if it is established that a practice of using different marks for the same product, or preventing the use of a trademark name on repackaged goods, was adopted in order to achieve partition of markets and to maintain artificially high prices.

[42] See: Maskus K (2001). "Parallel imports in pharmaceuticals: Implications on competition and prices in developing countries". Available at http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf.

[43] See Article 6, TRIPS agreement.

[44] Agreement on Trade-Related Aspects of Intellectual Property Rights.

means to ensure a balance between the protection of exclusive rights and the free flow of goods.

28. In summary, the legislative approach to parallel imports varies, depending on which of the two views above is favoured. However, it should be noted that in jurisdictions that allow parallel imports, attempts to undermine these are usually not qualified as a specific type of abusive behaviour by a dominant undertaking, but may constitute an anti-competitive vertical restraint.

Alternative approaches in existing legislation – Restrictions on the importation of goods

Region / Country	
Japan	Japan has taken measures in several cases against unfair prevention of parallel imports of branded porcelain tableware, pianos, ice cream and automobiles.
European Union	According to the principle of EU-wide exhaustion, IPR holders are not allowed to restrict parallel imports within the EU. This is constant jurisdiction of the Court of Justice of the European Union, since its landmark decision Deutsche Grammophon/Metro:[45] "It is in conflict with the rules providing for the free movement of products within the common market for the holder of a legally recognized exclusive right of distribution to prohibit the sale on the national territory of products placed by him or with his consent on the market of another Member State on the grounds that such distribution did not occur within the national territory. Such prohibition, which could legitimize the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite markets into a single market."
New Zealand	Parallel imports are legal when the conditions set by Section 12 (5A) of the Copyright Act 1994 No. 143 are met. The respective provision reads as follows: "An object that a person imports or proposes to import into New Zealand is not an infringing copy under subsection (3)(b) if— (a) it was made by or with the consent of the owner of the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made; or (b) where no person owned the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made, any of the following applies:

[45] Court of Justice of the European Union, 78/70 [1971] E.C.R. 487.

	(i) the copyright protection (or other equivalent intellectual property right protection) formerly afforded to the work in question in that country has expired: (ii) the person otherwise entitled to be the owner of the copyright (or other equivalent intellectual property right) in the work in question in that country has failed to take some step legally available to them to secure the copyright (or other equivalent intellectual property right) in the work in that country: (iii) the object is a copy in 3 dimensions of an artistic work that has been industrially applied in that country in the manner specified in section 75(4): (iv) the object was made in that country by or with the consent of the owner of the copyright in the work in New Zealand."

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

29. As a general rule, firms have freedom of contract and therefore enjoy the ability to refuse to deal with other undertakings. Jurisdictions recognize that an obligation to deal might lead to less investment and innovation. In some circumstances, however, refusals to deal may be used as a mean to exclude competitors or to grant a competitive advantage to another enterprise. This is especially likely to occur when an essential facility is owned by a dominant undertaking, i.e. where this undertaking owns facilities that are indispensible for its competitors to do business and which cannot be duplicated at commercially sensible cost. In these cases, the negative effects of the exclusion of competitors cannot be outweighed by promotion of investment and innovation.

30. However, it needs to be kept in mind that refusals to deal are not in and of themselves anti-competitive, and are part and parcel of competitive markets. Firms should generally be free to choose to deal, and also give preferential treatment, to traditional buyers, related enterprises, dealers that make timely payments for the goods they buy, or who will maintain the quality, image etc. of the manufacturer's product. This is also the case when an enterprise announces in advance the circumstances under which it will refuse to sell.

Alternative approaches in existing legislation – Refusal to deal

Region / Country	
Brazil	Law 8.884 of 1994 forbids an enterprise with a dominant position from “denying the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies” (article 20 and article 21, XIII).
United States	“The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified (*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct 2847, 86 L.Ed.2d 467 (1985)). Under certain circumstances, a refusal to cooperate with rivals can constitute anti-competitive conduct that violates [Section 2]. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anti-competitive conduct by a single firm. (…) We have never recognized such a doctrine [essential facilities] (…) and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the “essential facilities”; where access exists, the doctrine serves no purposes. .[46]

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

[…]

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

31. The above-mentioned behaviour is frequently an aspect of “exclusive dealing arrangements”, and can be described as a commercial practice whereby an enterprise receives

[46] Concerning unilateral refusals to deal, see: *United States v. Colgate & Co.*, Supreme Court of the United States, 1919. 250 U.S. 300, 39 S.CT. 465, 53 1.Ed. 992, 7 A.L. R. 443. Also: *Eastman Kodak v. Image Technical Services Inc.*, 504 US 451 (1992) (holding that a monopolistic right to refuse to deal with a competitor is not absolute, the jury should be permitted to decide if the defendant’s proffered reasons were pretextual).

the exclusive rights, frequently within a designated territory, to buy, sell or resell another enterprise's goods or services. As a condition for such exclusive rights, the seller frequently requires the buyer not to deal in, or manufacture, competing goods.

32. Under such arrangements, the distributor relinquishes part of his commercial freedom in exchange for protection from sales of the specific product in question by competitors. The terms of the agreement normally reflect the relative bargaining position of the parties involved.

33. The results of such restrictions are similar to those achieved through vertical integration within an economic entity, the distributive outlet being controlled by the supplier, but in the former instance, without bringing the distributor under common ownership.

34. It should be noted that a large number of competition laws do not only deal with exclusive distribution agreements under the prohibition on abusing a dominant position, but within the context of anti-competitive vertical agreements.

> *(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:*
>
> *[…]*
>
> *(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;*

35. Arrangements between a supplier and its distributor often involve the allocation of a specific territory (territorial allocations) or specific type of customer (customer allocations), i.e. where and with whom the distributor can deal. For example, the distributor might be restricted to sales of the product in question in bulk from the wholesalers, or to only selling directly to retail outlets. The purpose of such restrictions is usually to minimize intra-brand competition by blocking parallel trade by third parties. The effects of such restrictions are manifested in prices and conditions of sale, particularly in the absence of strong inter-brand competition in the market. Nevertheless, restrictions on intra-brand competition may be benign or pro-competitive if the market concerned has significant competition between brands.

36. Territorial allocations can take the form of designation of a certain territory to the distributor by the supplier, the understanding being that the distributor will not sell to customers outside that territory, nor to customers who may, in turn, sell the products in another area of the country.

37. Customer allocations are related to cases in which the supplier requires the buyer to sell only to a particular class of customer, for example only to retailers. Reasons for such a requirement are the desire of the manufacturer to maintain or promote product image or quality, or that the supplier may wish to retain for itself bulk sales to large purchasers, such as sales of vehicles to fleet users, or sales to the government. Customer allocations may also be

designed to restrict final sales to certain outlets, for example approved retailers meeting certain conditions. Such restrictions can be designed to withhold supplies from discount retailers or independent retailers for the purpose of maintaining resale prices and limiting sales and service outlets.

38. Territorial and customer allocation arrangements serve to enforce exclusive dealing arrangements which enable suppliers, when in a dominant position in respect of the supply of the product in question, to insulate particular markets one from another and thereby engage in differential pricing according to the level that each market can bear. Moreover, selective distribution systems are frequently designed to prevent resale through export outside the designated territory for fear of price competition in areas where prices are set at the highest level.

39. In this context, it should be noted, once more, that a large number of competition law regimes deal with exclusive and selective distribution systems not only under abuse of dominance provisions, but under provisions that prohibit anti-competitive vertical agreements.

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

[...]

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

40. Such behaviour is generally referred to as “tying and bundling”. Bundling involves offering two or more products together (for example, goods A and B). Pure bundling implies that products are only sold together (for example, A+B). Mixed bundling involves selling both the products together (A+B) and separately (A, B), in which case the first is offered for a discounted price – “bundled discounting”. Tying is a similar practice, whereby the product requested is only offered together with the “tied” product, which is also available separately (A+B, B). The “tied” product may be totally unrelated to the product requested or may be a product in a similar line. Tying arrangements are often imposed in order to promote the sale of slower-moving products, and in particular those subject to greater competition from substitute products. By virtue of the dominant position of the supplier in respect of the requested product, it is able to impose as a condition for its sale the acceptance of the other products.

41. “Tying and bundling” may harm competition by leading to anti-competitive foreclosure and contributing to the maintenance or strengthening of market power. Most jurisdictions understand that the competition agency must show the anti-competitive effects of tying and bundling arrangements, whereas the dominant company has the burden to prove that its conduct is justified by efficiencies.

Alternative approaches in existing legislation – "Tying and bundling"

Region / Country	
Latin America	
Brazil	Law 8,884 of 1994 forbids an enterprise with a dominant position from "conditioning the sale of a product on acquisition of another or on contracting of a service, or conditioning performance of a service on the contracting of another or on purchase of a product"(article 20 and article 21, XXIII).
North America	
United States	The United States Supreme Court had defined tying arrangements as: "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[47] Tying arrangements have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring another.[48] Liability for tying under section 1 of the Sherman Act exists where (i) two separate products are involved; (ii) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (iii) the arrangement affects a substantial volume of interstate commerce; and (iv) the defendant has "market power" in the tying product market.[49]

[47] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1,5 6,78 S. CT. 514, 518, 2 L.Ed.ed 545 (1958).

[48] See: *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 V.S.2, 12(1984); *Northern Pacific Railway Co. v. United States*, 356 US1, 6(1958); *Times-Picayune Publishing Co. v. United States*, 345 US 594, 605 (1953).

[49] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 US.2 (1984); *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 US. 451, 461-62 (1992).

III. *Authorization or exemption*

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are notified, as described in possible elements for article 6, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if the affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

42. In some competition law regimes, the competition authority can authorize behaviour that is not anti-competitive *per se* when possible efficiency gains outweigh the anti-competitive impact. European competition law followed this approach with respect to anti-competitive agreements and concerted practices until 2004. That is to say, the European Commission was not only empowered to adopt block exemptions which clarify conditions under which certain categories of contracts are not to be considered as anti-competitive, but it also authorized certain contracts and concerted practices individually upon a respective application by the companies concerned. The latter possibility was abandoned in 2004, and it now incumbent on the individual companies to assess whether their behaviour complies with the competition law requirements.

43. Not all countries that modelled their competition laws on the basis of EU competition law have uniformly adopted the shift towards the self-assessment of firms. For instance, a number of African competition law systems still empower the competition authority to grant individual exemptions of agreements and concerted practices. For further information on this question, reference is made to the commentaries on Chapters 3 and 5.

44. Note that traditionally, authorizations and exemptions only relate to anti-competitive agreements and concerted practices. However, it is not excluded that certain competition law systems also provide for this possibility in relation to the abuse of a dominant position.

NOTIFICATION

I. Notification by enterprises

1. When practices fall within the scope of articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the Administering Authority, providing full details as requested.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by affluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within (...) days/months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of articles 3 and 4, and existing on the date of the coming into force of the law, with the provision that they be notified within (...) days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within (...) days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfillment of conditions and obligations.

2. Periodical review procedure for authorizations granted every (...) months/years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfillment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:

(a) The circumstances justifying the granting of the authorization have ceased to exist;

(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization; and

COMMENTARIES ON CHAPTER V AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. As a preliminary matter, it should be noted that this chapter on notification discusses notification of agreements and not notifications of mergers and acquisitions. For

consideration of notifications in the context of mergers and acquisitions, see Chapter VI of the Model Law on Competition.

2. A system of notification is one where the competition authority engages in *ex ante* supervision, analysis and subsequent validation or authorization by granting clearance or exemptions to individual agreements that are notified to it. As opposed to a system where the parties to potentially anti-competitive agreements have to undertake a self-assessment and bear the risk of wrongly assessing the agreement in question, the notification system transfers this responsibility to the hands of the competition authority. Where parties to an agreement believe that their agreements could be in contravention of any of the purposive clauses of the country's competition law, they can file a notification form with the competition authority. This form is typically designed by the competition authority to discern information about the subject matter of the agreement, the section of the law that is thought to be contravened, the relevant market, the competitors to the parties to the agreement, the largest customers affected by the transaction, and the facts relied on for the exemption. This information shall enable the authority to conduct a competition law analysis about the likely competitive effects of the transaction on the identified relevant market and whether there is cause to grant authorization/exemption as the case may warrant.

3. The model law lays out the standard purposive clauses used in a notification regime and these clauses can be incorporated in the primary legislation on restrictive trade practices or in the competition law, as well as in the subsidiary regulation.

4. A good example of a notification regime, and typical procedures used under such a regime is the former enforcement regime of the European Union which was put in place by Council Regulation No. 17 of 6 February 1962.[50] Under this regime, parties to agreements that possibly fell within the prohibitions of anti-competitive agreements could find that their agreement was void and unenforceable in a court of law if the agreement had not been notified to the European Commission and subsequently been granted exemption or clearance. This was the case even if the agreement would have warranted exemption in case of a notification. Only notification of an agreement to the Commission created the possibility of an exemption. Therefore, parties to an agreement could not enforce it in a national court during the period between the agreement coming into force and the time of its notification. This meant that if parties wanted their agreements to have the force of law they had to file a notification, which led to a large number of notifications being filed with the European Commission.[51]

5. In order to deal with the administrative backlog created by the enormous numbers of filings, the Commission devised a system whereby filed notifications that could not be given full treatment were assessed preliminarily. Upon preliminary assessment, one of two

[50] This is the regime that has been replaced by the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003 L1/1.

[51] Sufrin B and Jones A (2004). *EC Competition Law.* 2nd Ed. Oxford University Press. According to Laurent Warlouzet "Historical Institutionalism and Competition Policy: the Regulation 17/62 (1962-2002)", available at: http://www.uaces.org/pdf/papers/0901/warlouzet.pdf: 37,000 filings were made within a few months of the system coming into force. Only five decisions were taken by the Commission by 1968, seven years after the regulation came into effect.

outcomes was possible: The European Commission issued a comfort letter or a letter of administration, neither of which was binding in a court of law. A comfort letter, by brief explanation, issued a statement that the agreement did not violate the prohibition of anti-competitive agreements (so-called negative clearance letter); or that an exemption was warranted for the agreement. The latter type of comfort letter issued a preliminary finding only and not an exemption and so this type of letter meant that the agreement was void and unenforceable because the EC Treaty stated that an agreement was void unless exempted); or that a block exemption or Commission notice applies to the agreement. If the Commission concluded in its preliminary assessment that an agreement was likely to produce anti-competitive effects and did not merit an exemption, it issued a so-called letter of administration, when it had taken the decision not pursue a formal decision.

6. The former notification regime of the EU and the passage that lead to modernization of that regime illustrates some of the advantages and disadvantages of a notification regime.

Box 5.1

Overview over advantages and disadvantages of a notification regime

Advantages	**Disadvantages**
– A notification system under which all agreements have to be notified helps a young competition regime during its institutional building phase to gather relevant information and build a useful and resourceful database. There is a continuous flow of information to the competition authority. – Often filings bring to the attention of the competition authority horizontal agreements that are anti-competitive and which otherwise would not necessarily have been revealed owing to the parties' similar interests. – A notification system builds legal certainty in an environment where the competition law is new to the legal landscape and the local jurists have little knowledge about the principles underpinning the law. – Thereby, it also helps establishing a "competition culture" at a time when competition law concepts are still little known.	– A notification regime can place a heavy burden on a competition authority's resources and can therefore prove counterproductive if insufficient resources remain available to deal with other matters, in particular if pernicious offenses cannot be properly investigated and prohibited. – If many filings are made with the authority agreement, it is difficult to give each adequate consideration.

Information to be provided in the notification form

7. A competition authority can request as much information as it needs to understand how the agreement will impact on competition and whether there are any redeemable features of the agreement or practice warranting an exemption. Therefore, in seeking authorizations, the enterprises would be required to notify the full details of intended practice or agreement to the Administering Authority. The particulars to be notified may depend on the circumstances and are unlikely to be the same in every instance. The information required can include, *inter alia*:

(a) The name(s) and registered address(es) of the party or parties concerned;

(b) The names and the addresses of the directors and of the owner or part owners;

(c) The names and addresses of the (major) shareholders, with details of their holdings;

(d) The names of any parent and interconnected enterprises;

(e) A description of the products or services concerned;

(f) The places of business of the enterprise(s), the nature of the business at each place, and the territory or territories covered by the activities of the enterprise(s);

(g) Further information on the relevant market and the parties' competitors;

(h) The date of commencement of any agreement;

(i) Its duration or, if it is terminable by notice, the period of notice required; and

(j) The complete terms of the agreement, whether in writing or oral, in which oral terms would be reduced to writing.

8. It is also important to note that the information provided in the notification form could become public and so the lawmaker must devise a system to protect the confidential information submitted in the notification. For example, the Competition Commission of South Africa provides a form in which the exemption applicant can identify information that is confidential and which would be submitted with the application.

9. In seeking authorization, it is often the notifying parties' responsibility to demonstrate that the intended agreement will not have the effects proscribed by the law, or that it is not in contradiction with the objectives of the law.

Alternative approaches in existing legislation – Notification regimes

Country	
Australia[52]	The Trade Practices Act specifies when the Australian Competition and Consumer Commission (ACCC) may grant authorization. Broadly, conduct may be authorized if the public benefit outweighs any public detriment. The Act contains different tests for authorizing different types of

[52] *Source:* Australian Competition and Consumer Commission (ACCC), *Guide to authorisation*, 28 May 2007, available at: http://www.accc.gov.au/content/index.phtml/itemId/788405/fromItemId/3737.

Country	
	conduct. The two different tests are as follows: – The ACCC may not grant authorization for the making or giving effect to proposed or existing contracts, arrangements or understandings that might contain cartel provisions, might substantially lessen competition or involve exclusive dealing (other than third line forcing) unless it is satisfied in all circumstances that the agreement or conduct is likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition (the first test). – The ACCC may not grant authorization to proposed exclusionary provisions (primary boycotts), secondary boycotts, third line forcing and resale price maintenance unless it is satisfied in all the circumstances that the proposed provision or proposed conduct is likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place (the second test).
Singapore	In Singapore, a good number of exemption and exclusion apply in respect of agreements. For example, in the Third Schedule the Competition Act 2004, an agreement that prevents, restricts or distorts competition, in contravention of section 34, is excluded from the application of section 34: – If the agreement was made to comply with a requirement imposed by a written law (see section 2(1)); – To avoid conflicts with Singapore's international obligations (see section 3); – If the Minister is satisfied that there are exceptional and compelling reasons of public policy warranting non-application of Section 34 to an agreement (see section 4); or – If the agreement relates to goods or services to the extent that another written law relating to competition gives another regulatory authority jurisdiction over the matter (see section 5). Also, Section 34 will not apply to agreements which contribute to improving production or distribution or which promotes technical or economic progress. Further, an exemption can be granted for an agreement which contravenes Section 34 if a block exemption is likely to apply. A notification can be made to the Commission for **guidance** as to whether the agreement is likely to infringe section 34 and if so, whether the agreement is likely to be exempted by a block exemption. Alternatively a notification can be made to the Commission for a **decision** as to whether the section 34 has been infringed. Notification offers immunity from penalty during the period when the agreement is subject to review by the Commission—beginning with the date of notification and

Country	
	ending with the date a notice is issued by the Commission in respect of the notified agreement. No exemptions can be sought for an agreement made by an undertaking entrusted with the operation of services of general economic interests or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance of the particular tasks assigned to that undertaking. See the Third Schedule of section 1 of the Competition Act.
South Africa	In South Africa, section 10 of the Competition Act of 1998 allows for the granting of an exemption for an agreement or practice that constitutes a prohibited practice under Chapter 2 of the legislation which addresses restrictive horizontal and vertical practices and abuse of dominance. To qualify for an exemption the agreement or practice must be found to: – Contribute to the promotion or maintenance of exports; – Promote the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons; – Change the productive capacity to stop decline in an industry; – Maintain economic stability in an industry designated by the Minister.

I. Notification by enterprises

1. When practices fall within the scope of articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the Administering Authority, providing full details as requested.

10.Paragraph I.1 of Chapter V the Model Law creates room for a very broad and encompassing notification regime. The provision refers to both possibly anti-competitive agreements falling within the scope of Chapter III and unilateral behavior captured by the prohibition of the abuse of a dominant position in Chapter IV. Although there is nothing to stop a lawmaker from employing such a broad notification or exemption system, in fact it is rare that a notification system is used for abuse of dominance-type conduct. If a highly concentrated industry sector requires particular oversight and *ex ante* intervention in order to safeguard competition, sector regulation appears to be the more frequently used tool. Accordingly, incumbent companies in regulated industry are often subject to specific notification requirements outside the application of the general competition law regime.

11.Furthermore, as previously mentioned, a broadly worded notification regime can also lead to large numbers of notifications. New competition authorities should not underestimate the pressure posed by a notification regime on its resources. Competition authorities can become quickly paralyzed by the large numbers of notification. A new competition law regime would be well advised to use drafting language that can properly classify the types of agreements that are to be notified.

12.One approach to wording the notification or exemption provision could be to require notification for only certain classes of agreements, for example, notification could be required for specified classes of horizontal agreements which are potentially anticompetitive, or agreements which exceed a certain threshold, for example, where the combined market share of the notifying parties indicates that together they have substantial market power, which would require scrutiny of any agreement passed between them.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

13.Paragraph I.2 of Chapter V deals with the question of who should be entitled to notify an agreement.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by affluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within (...) days/months of the event) (immediately).

14.Paragraph I.3 of Chapter V concerns situations where a company enters into a number of parallel agreements with different parties. For the purpose of procedural efficiency, the provision suggests that it should be possible to notify only one of the parallel agreements, provided that their terms are the same and information as to the identity to all contracting partners is provided to the competition authority.

15.The provision provided for by paragraph I.4 of Chapter V becomes relevant when the authorization granted by the competition authority is not limited in time. If circumstances change that were relevant for the initial competition law assessment and authorization, it might be prudent for a competition law regime to order a notification of these changes and thereby allow the competition authority to reassess the agreement in light of its new circumstances.

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of articles 3 and 4, and existing on the date of the coming into force of the law, with the provision that they be notified within (...) days/months) of such date.

16.Paragraph I.5 of Chapter V addresses the situation where potentially anti-competitive agreements have been concluded and executed prior to the entry into force of the competition law. By obliging the parties to also notify also pre-existing agreements to the competition authority, it allows the authority to exercise its control function and to ensure compliance with the new competition law.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

17.From the perspective of the notifying parties, obtaining provisional authorization upon notification and being able to implement the agreement immediately may appear to represent the preferred option. However, such provisional authorization entails severe consequences in terms of restitution and liability if the competition authority does not grant an authorization after having carried out its assessment. From the perspective of legal certainty, making the entry into force of an agreement depending on its authorization may appear the best solution. However, if its workload does not allow the competition authority to assess all notifications in a timely fashion, this option may lead to significant delays, which may impact on an agreement's economic significance. Against this background, the third option set out in paragraph I.6 of Chapter V takes on board considerations of procedural efficiency. If a reasonable assessment period set by the law expires, the agreement is deemed authorized. This option enables the competition authority to exercise its control function and scrutinize agreements that raise severe competition concerns, while it provides the notifying parties with a timeframe for their planning.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

18.Paragraph I.7 of Chapter V deals with the consequences of non-compliance with the notification obligation. The provision suggests that non-compliance should be "subject to the full sanctions of the law", which may entail automatic nullity of the agreement and the imposition of fines, even when the agreement would qualify for an exemption upon notification. Taking into account the principle of proportionality, it appears therefore also well justified that a competition law limits the sanctions for a failure to notify to the imposition of a procedural fine and reserves other sanctions for agreements that actually prove to be anti-competitive based on the assessment by the competition authority.

II. Action by the Administering Authority

1. *Decision by the Administering Authority (within (...) days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfillment of conditions and obligations.*
2. *Periodical review procedure for authorizations granted every (...) months/years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfillment of conditions and obligations.*
3. *The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:*
   - (a) *The circumstances justifying the granting of the authorization have ceased to exist;*
   - (b) *The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;*
   - (c) *Information provided in seeking the authorization was false or misleading.*

19.Paragraph II of Chapter V provides for the possible actions of a competition authority under a notification regime. With respect to paragraph II.1, it should be noted that setting a time limit for review of an agreement is a typical feature of a notification regime. It is often combined with the presumption that an authorization is deemed granted if the review period expires without action by the competition authority. While a stated time limit should be incorporated in the legislation, it is important to note that assessing the competitive effects of an agreement takes time and is generally burdensome, and could require review and assessment of information that goes beyond that which was provided on the notification form. Against this background, some competition law regimes allow the authority to extend the review period, if the complexity of the matter requires additional time. This is also where the issuance of a provisional validity or temporary immunity during the currency of the assessment period becomes useful.

20.Given that relevant circumstances for the authorization, in particular the structure of the relevant market affected by the agreement, may change over time, it may be prudent for a competition law regime to order periodic revision of authorizations, if these authorizations are granted for and indefinite or extended period. If the competition authority limits authorizations in time, such revision may not be necessary, since the notifying parties will have to resubmit a notification upon expiry of the authorization.

21.Finally, an authorization may be withdrawn in the cases listed under paragraph II.3 c of Chapter V.

Model Law on Competition (2010) – Chapter VI

Objectives or purposes of the law

To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

COMMENTARIES ON CHAPTER VI AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. Mergers and acquisitions (M&As) are an integral part of economic activities today. From an economic perspective, different types of mergers can be distinguished based on their motivation.

2. Industrial mergers are motivated, inter alia, by: geographic expansion; diversification of a company's activities or its products and services portfolio; consolidation of its market position; and greater production efficiency through economies of scale and scope allowing a company to produce goods at a lower marginal cost while operating at the minimum efficient scale of production. They may result in firms obtaining better access to capital, the enhancement of research and development capacities, and better use of management skills. In addition, mergers present a means of exit from a given market, whether it is because the firm is failing or it wishes to restructure its activities.

3. On the other hand, mergers and acquisitions may be carried out purely for investment purposes. In particular, private equity funds and investment banks acquire companies with the objective of increasing shareholder revenues on a short-term basis and profitably reselling the company or parts of it in the medium term.

4. Most mergers do not hamper competition in a market. However, some may alter the market structure in a way that raises competitive concerns. The merged entity may enjoy increased market power and face limited competition so that it will be in a position to restrict output and raise prices. Merger control aims to address competition concerns arising from such mergers by preventing the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power.

5. Although most competition regimes around the world include merger control provisions, the content and enforcement of these provisions vary across different jurisdictions. Differences in the treatment of mergers under competition laws relate to, inter alia:

- legal provisions and enforcement policy relating to the different types of mergers;
- the structural and behavioural factors taken into account and their relative importance, including the market share and/or turnover thresholds to trigger off scrutiny by competition authorities, and the anti-competitive criteria to be met before an arrangement would be forbidden in principle;
- the treatment of efficiency gains and of non-competition criteria;

- the coverage and structure of exemptions; and
- procedural arrangements, such as voluntary or compulsory notifications for mergers of firms meeting certain turnover or market share requirements, or ex post facto possibilities for intervening against mergers, and remedies or sanctions.

6. Nonetheless, on the whole, the similarities among most competition regimes relating to the treatment of mergers are more important than the differences. In recent years, several countries have adopted separate provisions in their competition laws to cover mergers, and as part of this general trend towards the adoption or reform of competition legislation, many countries have adopted or reformed merger controls following the same broad orientations.

Terminology

7. An essential element of merger control legislation is the definition of those transactions that shall be subject to control by the competition authorities. The underlying idea is to capture all transactions that transform formerly independent market players into a single player and thereby alter the structure of a market possibly to the detriment of competition. Nevertheless, the terminology used for the definition of transactions subject to merger control varies significantly across different jurisdictions. This section provides a brief overview of the various definitions of notifiable transactions and the potential harm they may cause to competition.

Concentration

8. Concentration may be used to describe the acquisition of control over another undertaking through M&A activity or otherwise. It may therefore be used interchangeably with the term "merger" described below. Concentration may also be used to describe the number of players in a given market. Basically, a high level of concentration in a market indicates few market players whereas low market concentration is indicative of numerous players on a market. The "Market Concentration Doctrine" is widely used as an indicator of industry market power. Broadly, a relatively high level of concentration, when combined with high barriers to entry, is believed to facilitate industry collusion or dominance, and provides the optimal environment for market players to exercise market power.[53]

Merger

9. According to corporate law, a merger is generally defined as a fusion between two or more enterprises previously independent of each other, whereby the identity of one or more is lost and the result is a single enterprise. The expression "merger" in competition law is often broader than its corporate meaning, and can include an acquisition or takeover, a joint venture, or even other acquisitions of control, such as interlocking directorates (see below).

Acquisition/takeover

10. The acquisition or takeover of one enterprise by another usually involves the purchase of all or a majority of shares of another company, or even of a minority shareholding, so long as it is sufficient to exercise control and substantial influence. In some countries, the acquisition of substantial assets of another company also qualifies as a notifiable transaction, if it allows the acquirer to enter into the related market position of the seller. The acquisition of a production site or another functional unit of another company may

[53] Espen Eckbo B (1985). Mergers and the market concentration doctrine: Evidence from the capital market. *Journal of Business* 58: 325–349.

serve as an example in this respect. Acquisitions may take place without the consent of the target company. This is known as a “hostile” acquisition or takeover.

11. As mentioned above, joint ventures and interlocking directorships are often included within the definition of mergers for the purposes of merger control.

Joint ventures

12. Joint ventures are “agreements between firms to engage in a specific joint activity, often through the creation of a jointly owned and controlled subsidiary, to perform a task useful to both or to realize synergies from the parents’ contributions.”[54] They may produce “commonly needed inputs, manufacture commonly produced outputs or combine expertise for research and development.” Alliances are a form of joint venture, which are used for joint endeavours by firms in different geographic markets and which allow for mutual penetration in each partner’s market. Alliances are often the preferred structure for mergers in the airline and telecommunications industries.[55]

13. If the collaboration creates a new function or business, or performs an old function better, then it usually has pro-competitive effects. However, competition concerns arise where the joint venture serves to create or enhance market power, entails overly restrictive ancillary agreements, or is an unnecessary vehicle by which to achieve the desired objectives (i.e. a less anti-competitive means is available). In such circumstances, a joint venture may harm competition and might even be used to disguise collusive activities such as price-fixing or market division.[56] For example, this will be the case when the common links of the two parent companies to the joint venture lead to collusion outside the scope of the joint venture (“spillover effects”).[57] Reduction of actual or potential competition and foreclosure could also occur. Depending on the degree of integration between the two businesses, a joint venture can be reviewed as a merger or just as an agreement among competitors.

Interlocking directorship

14. An interlocking directorship describes a situation where a person is a member of the board of directors of two or more enterprises, or the representatives of two or more enterprises meet on the board of directors of one firm.

15. The competition concerns here lie in the possibility that an interlocking directorship may lead to administrative control whereby decisions regarding investment and production can, in effect, lead to the formation of common strategies among otherwise competing enterprises, on prices, market allocations, and other concerted activities. At the vertical level, interlocking directorships can result in vertical integration of activities between – for example – suppliers and customers, discouraging expansion into competitive areas and leading to reciprocal arrangements among them.

Alternative approaches in existing legislation – Definition of merger

Country/Region	
Brazil	All mergers, acquisitions and associations (including joint ventures) are caught by the Brazilian merger regulations as long as they meet prescribed thresholds and have certain

[54] Fox E (2008). Chapter 14: Competition law. In: Lowenfeld A. *International Economic Law*. Second edition. Oxford University Press: 445.
[55] ibid.
[56] ibid.
[57] Jones et al. (2007). *EC Competition Law*. Second edition. Oxford University Press: 1094.

	defined effects on the market in Brazil (see Article 54 of Brazilian Antitrust Law 8,884 of 1994, paragraph 3).
China	In China, the definition of “mergers and acquisitions” is very broad, emphasizing the effect of control. According to Article 20 of the Anti-Monopoly Law of the People’s Republic of China, the definition of “mergers and acquisitions” includes merger of business operators or acquirement of equities or assets or the exertion of a decisive influence on other business operators by contract or any other means.
European Union	Concentrations caught under the ECMR[58] include any merger of two or more previously independent undertakings, or the acquisition of direct or indirect control of the whole or part(s) of another undertaking, which brings about a durable change in the structure of the undertaking concerned. This includes all full-function joint ventures that meet a prescribed turnover threshold. Full-function joint ventures include those that are autonomous economic entities resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents (see Article 3 ECMR).
South Africa	In clause 12 of Chapter 3 of the Competition Act 89 (1998), “merger” is defined as any transaction involving the direct or indirect acquisition or establishment of control by one or more persons over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of shares, interest or assets, by amalgamation, or by any other means.
United States	The United States merger regulations catch acquisitions of assets or voting securities. Such acquisitions may include acquisitions of a majority or minority interest, joint ventures, mergers, or any other transaction that involves an acquisition of assets or voting securities (see the Hart-Scott-Rodino Antitrust Improvement Act 1976 (HSR Act)).

16. From an economic perspective, a merger may be horizontal, vertical or conglomerate.

Horizontal mergers

17. Horizontal mergers are those that take place between actual or potential competitors in the same product and geographic markets and at the same level of the production or distribution chain. Such mergers raise competition concerns because they may lead to a reduction in the number of rivals in the market, causing increased market concentration. Furthermore, a horizontal merger usually results in the merged entity gaining a larger market share by aggregation.

[58] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24/1 of 29 January 2004).

18. This combination may be problematic for two reasons. Firstly, owing to its larger combined market share and the reduced number of competitors on the market, the merged firm may have gained "market power", allowing it to unilaterally raise prices and restrict outputs (unilateral effects). Secondly, the resulting increase in market concentration makes it easier for market players to coordinate and exercise "joint market power" by engaging in interdependent behaviour (coordinated effects).[59]

19. Horizontal mergers, more than other forms of mergers, may present severe competition concerns, and have the potential to contribute most directly to concentration of economic power and to lead to a dominant position of market power or to unlawful collusions.

Vertical mergers

20. Vertical mergers occur where firms that operate at different levels of the production and distribution chain merge (i.e. a merger between a supplier and a distributor). Vertical mergers generally raise fewer competition concerns than horizontal ones, and may even prove beneficial if savings from synergies and efficiencies are transferred to consumers by way of lower prices. However, vertical mergers may raise concerns where they lead to foreclosure; that is to say, where the merged entity will have the ability to control the chain of production and distribution, allowing it to drive existing competitors out of the market or create/increase barriers to the entry of new competitors at one or more functional levels. In addition, vertical mergers may increase the ease with which competing firms can coordinate, if, for example, they lead to increased price transparency.[60]

Conglomerate mergers

21. The term conglomerate mergers refers to mergers between parties involved in totally different markets and activities. Generally, they raise few competition concerns, as they do not affect or change the structure of competition in a specific market. However, in some circumstances, conglomerate mergers may grant the merged entity market power, allowing it to foreclose competitors in separate but related markets.

Notification obligations

22. Merger notifications allow mergers to be brought to the attention of competition authorities, and facilitate the enforcement of merger control. Merger notification obligations vary across competition law regimes. These variations fall into three broad categories:

- those that mandate notification prior to the completion of a merger transaction ("mandatory ex ante" regimes);
- those that allow merging parties to notify authorities after the merger is consummated ("mandatory ex post" regimes); and
- those that leave it entirely to the discretion of the merging parties ("voluntary" regimes).

23. Many voluntary regimes encourage informal inquiries and notification from merging parties to reduce the risk of the completion of anti-competitive mergers and to avoid the need for costly intervention by the authority. Nonetheless, whether notification requirements are voluntary or mandatory, competition authorities usually have the power to investigate potentially anti-competitive mergers if they are consummated without authority clearance,

[59] Whish (2009). *Competition Law*. Sixth edition. Oxford University Press: 779–800.
[60] ibid.: 809.

and often have the ability to apply remedies or seek these from a court to minimize or counter any anti-competitive effects from such mergers.

24. For the purpose of procedural efficiency and to minimize administrative costs, virtually all competition law regimes limit a notification obligation to transactions of a certain economic significance that may potentially raise competitive concerns. This objective is realized through notification thresholds, pertaining to the asset value and/or turnover of the merging parties, their geographical position, and the combined market share of the merging parties in the relevant markets. Only when the proposed transaction reaches the respective notification threshold is the notification obligation triggered.

Alternative approaches in existing legislation – Jurisdictional thresholds

Country/Region	
Voluntary merger control regimes	
Australia	Section 50 of the Trade Practices Act 1974 (TPA) prohibits corporations from directly or indirectly acquiring shares or assets if doing so will substantially lessen competition in a substantial market in Australia. Although notification is voluntary, the Australian Competition and Consumer Commission (ACCC) guidelines indicate that it expects to be notified of mergers well in advance where the products or services of the merged parties are either substitutes or complements, and the merged firm will have a post-merger market share of greater than 20 per cent (ACCC Merger Guidelines 2008).
United Kingdom	Jurisdictional thresholds are based on the fulfilment of either a turnover test and/or a share of supply test. The turnover test is fulfilled where the target company has a turnover in the United Kingdom of more than £70 million (which will catch the majority of significant acquisitions). The share of supply test is fulfilled where both parties are active in a particular market segment and their combined share of this segment is more than 25 per cent.
Mandatory merger control regimes	
European Union	The EC Merger Regulation (ECMR) requires concentrations that have Community Dimension to be notified. Community Dimension is determined by reference to turnover thresholds, which are as follows: The aggregate worldwide turnover of all the parties exceeds 5 billion euros; and The Community-wide turnover of each of at least two parties exceeds 250 million euros; unless: Each of the parties achieves more than two thirds of its

	aggregate Community-wide turnover in one and the same member State. See Article 1 of Council Regulation (EC) No 139/2004.
South Africa	Generally, notification requirements only apply to intermediate and large mergers. The thresholds for intermediate and large mergers differ, but are assessed annually. These thresholds relate to the turnover and assets of the merging parties.
Sweden	A concentration shall be notified to the Swedish Competition Authority if (a) the combined aggregate turnover of all the undertakings concerned in the preceding financial year exceeds SEK 1 billion; and (b) at least two of the undertakings concerned had a turnover in Sweden in the preceding financial year exceeding SEK 200 million for each of the undertakings. Notably, the thresholds that apply in Swedish merger control apply only to the undertakings' turnover in Sweden (i.e. strong local nexus).
United States	Under Chapter 1 §18a of the HSR Act, notification is required where the following conditions are fulfilled: – The "*commerce*" test: Either the acquiring or the acquired party is engaged in US commerce or in any activity affecting US commerce; – The "*size-of-transaction*" test: The amount of voting securities or assets which will be held as a result of the acquisition meets a dollar threshold (the threshold is adjusted annually and amounts to $65.2 million in 2010); – The "*size-of-the-parties*" test: The size-of-the-parties test only applies to transactions with a value that does not exceed $262.7 million (subject to annual adjustment). The test is satisfied if one party has worldwide sales or assets of $13 million or more (as adjusted annually), and the other has worldwide sales or assets of $130.3 million or more (as adjusted annually); and – No exemptions applicable: The merger does not qualify for any of the exemptions set out in the HSR, for example the acquisition of non-voting securities.

Merger control analysis

25. Again, there is vast variation amongst jurisdictions worldwide in relation to assessing the legality of mergers. Most frequently, one of the following tests is applied to assess the outcomes that are likely to occur as a result of the merger:

– Will there be a substantial lessening of competition in a given market?

– Will the merger result in the creation or strengthening of a dominant position (higher consumer prices or reduced output are the usual indicia of these effects)?

– Will competition be prevented, distorted and/or restricted?

Alternative approaches in existing legislation – Substantive assessment criteria

Country/Region	
Brazil	Brazilian competition law contains tests both for dominant position and for lessening or restriction of competition. Competition authorities have adopted horizontal merger guidelines that establish that a merger shall not be considered harmful to competition when it: (i) does not grant control over a substantial part of the relevant market; (ii) does grant control over a substantial part of the relevant market, but the exercise of market power is unlikely given other structural factors (e.g. low entry barriers); (iii) does grant control over a substantial part of the market and the exercise of market power is likely, but those negative effects do not amount to the welfare gains generated by the transaction's efficiencies. The substantive test requires causality between the transaction and the control of a substantial part of the relevant market, or the necessary conditions to exercise market power without which the merger must be cleared. (See Joint Directive SDE-SEAE 50/2001).
China	The AML prohibits mergers that have or are likely to have the effect of eliminating or restricting competition, unless the parties can show that the concentration may improve conditions for competition and that the positive effects on competition resulting from the merger outweigh any negative effects. MOFCOM may also permit mergers on certain public interest grounds. The following factors are taken into account by MOFCOM when assessing a merger: The market share of the merging parties and the ability of them to control the market;

	The level of concentration in the relevant market; The likely effect of the merger on market access and technology development; The likely effect of the merger on consumers and other market players; The likely effect of the merger on the development of the national economy; and Other factors that affect competition that are considered relevant by MOFCOM.
European Union	The ECMR prohibits mergers that significantly impede effective competition in the common market, or a substantial part of it, particularly as a result of the creation or strengthening of a dominant position (see Article 2 of Council Regulation (EC) No 139/2004).
United States	The Clayton Act (1914) prohibits acquisitions which may result in the substantial lessening of competition or the creation of a monopoly. Various merger guidelines published by the antitrust agencies have also indicated that mergers should not be permitted if they create or enhance market power or facilitate its exercise. "Market power" is defined as the ability of a seller to "profitably… maintain prices above competitive levels for a significant period of time." (See Joint Commentary on Horizontal Merger Guidelines (2006), available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.)
Zambia	The substantive test for clearance of a merger is the substantial lessening of competition test, which requires authorities to consider: whether the proposed merger would result in dominance or in the acquisition of market power; whether the proposed merger would result in a foreclosure of the relevant markets; the existence of parallel imports or the lack of such parallel imports; and any countervailing consumer power. The substantial lessening of competition test is applied subject to public interest considerations such as the creation of employment and the empowerment of Zambians. Possible efficiency gains are also considered. (See Section 8 of the Competition and Fair Trading Act 1994.)

26. Merger control analysis is necessarily forward-looking and involves a comparison of the market situation before and after the proposed merger in order to assess the potential effect on

competition ("counterfactual"/prognosis analysis).[61] A counterfactual analysis of the market generally incorporates the following aspects:[62]

(i) Market definition (what is the relevant market in geographical or product terms?);

(ii) Assessment of the pre-merger market structure and concentration (what existing firms are there, what are their shares and strategic importance with respect to the product markets, which firms might offer competition in the future?);

(iii) Assessment of the likely effects of the notified merger, including unilateral and coordinated effects (the likelihood that the merged entity will have the power to exercise market power unilaterally and the likelihood that the merger will give rise to more opportunity for market players to coordinate behaviours); and

(iv) The likelihood of new entry and the existence of effective barriers to new entry and expansion.

27. It is often up to the merging parties to rebut any theory of competitive harm put forward and to show that the merger will not adversely affect the competition in the market in comparison to the status quo. A careful balance must be struck with regard to the evidence requirements. Competition authorities must ensure on the one hand that the criteria are not so demanding that they cause beneficial mergers to be abandoned, and on the other hand that the standard of proof is not so low that some harmful mergers are cleared.

28. In addition to the above general themes, some jurisdictions include other "public interest" considerations in merger control analysis. Such considerations include, inter alia, financial stability, the protection of national champions, industrial policies, the promotion of employment, the survival of small and medium-sized enterprises, and increasing the ownership status of historically disadvantaged persons. While many of these public interests are important, they are not strictly related to competition, and usually entail certain trade-offs (e.g. an outcome that is less than the most efficient).

29. The formation of national champions presents an interesting example of such a trade-off. Some nations with small markets may want to channel the merger of domestic firms into one national champion**,** resulting in a monopoly position domestically, on the argument that this might allow it to be more competitive in international markets. However, in the absence of regulatory controls, such champions are very likely to extract "monopoly rents" domestically, and without the discipline of competition in their domestic markets, may also fail to become more competitive in international markets, to the ultimate detriment of domestic consumers and eventually to the development of the economy as a whole. Moreover, in the case of small economies, domination of the domestic market is unlikely to generate the economies of scale necessary to be internationally competitive. On the other hand, if the local market is open to competition from imports or foreign direct investment, the world market might be relevant for the merger control test, and the single domestic supplier may be authorized to merge. Consequently, competition authorities need to balance considerations of international competitiveness against the potential resultant harm to the domestic market.

30. What is certain is the necessity for competition authorities and governments to engage in thorough deliberation, in order to decide if public interest considerations should be adopted in the competition policy or if they are better achieved through alternative and more effective means.[63]

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[61] Whish (2009). *Competition Law*. Sixth edition. Oxford University Press: 811.
[62] See ICN's Merger Guidelines Workbook (2006).
[63] Whish (2009). *Competition Law*. Sixth edition. Oxford University Press: 805–806 and 813–814.

Remedies

31. Competition authorities usually have the power to clear or prohibit a merger based on their analysis of the likely effects on competition. Furthermore, where a notified transaction raises competitive concerns, a number of merger control regimes allow the notifying party to propose remedies and thereby restructure the proposed transaction in a way that resolves the competition issues. The competition authority would then have to assess the altered transaction. Other jurisdictions empower the competition authority to impose such remedies upon the notifying parties.

32. Taking into account that merger control is concerned with safeguarding competitive market structure, structural remedies appear to be the first choice to remedy competitive concerns raised by a transaction under scrutiny. The divesture of certain aspects of the merging parties' businesses (usually areas of overlap) in order to prevent or reduce the increase of market power is the most effective form of structural remedy available to competition authorities.

33. Structural remedies are easier to adopt in mandatory ex ante or pre-notification regimes, as the merging parties can be required to put the structural changes in place before the merger has been completed. Although many authorities have the power to undo anti-competitive mergers after they have been consummated, this is clearly a more disruptive and time-consuming approach.

34. Many competition authorities may also utilize behavioural remedies whereby merging parties agree to take certain actions upon completion of the merger (granting licences to competitors, for example) which address competition concerns. In merger cases, behavioural remedies are generally less effective than structural remedies, owing to difficulties in monitoring and tracking implementation.

Alternative approaches in existing legislation – Remedies

Country/Region	
Brazil	The CADE has extensive remedial powers and is expressly permitted to use whatever measures available to resolve any damage to competition resulting from a merger. This includes requiring the dissolution or break-up of the merged entity. (See Article 54 of Brazilian Antitrust Law 8,884 of 1994, para. 9).
China	AML grants MOFCOM the power to block mergers or impose remedies before clearance is granted. It also has at its disposal various legal sanctions against merging parties for non-compliance, and may impose structural remedies, behavioural remedies, or a combination of both.

European Union	The Commission has the power to fine firms up to 10 per cent of their aggregate annual worldwide turnover for failing to comply with requirements to suspend implementation of a merger pending Commission examination, or for consummating a merger that has been prohibited by the Commission. The Commission may also impose periodic penalty payments of up to 5 per cent of average daily worldwide turnover for each day that an infringement persists. Furthermore, fines of up to 1 per cent of aggregate worldwide turnover may be imposed in certain circumstances, for instance where misleading or incorrect information was supplied by the merging parties. In the event that an anti-competitive merger has already been completed, the Commission may require its complete dissolution and may impose interim measures or other action necessary for the restoration of effective competition in the given market. (See Article 8 of Council Regulation (EC) No 139/2004.)
Kenya	The competition authority may refuse authorization of a merger or grant approval on a conditional basis. Conditions may include divestments of sections of the business of the merging parties. Behavioural remedies are also available to the competition authority. (See Article 31 of the Restrictive Trade Practices, Monopolies and Price Control Act 1990).
United States	The competition authorities may seek an injunction in the federal court to prohibit completion of a proposed merger. The Federal Trade Commission (FTC) may also bring administrative proceedings to determine the legitimacy of a merger. Failure to comply with provisions of the HSR Act may result in a fine of up to $16,000 per day for the period of violation. Structural remedies are commonly used, particularly in the form of a consent order requiring merging parties to divest certain portions of existing assets or a portion of assets to be acquired on completion of the transaction. Behavioural remedies are also available to authorities, but it is uncommon for them to be used in merger cases.

Cross-frontier acquisition of control

35. Given their potential effects on the local market, many competition law regimes also subject so-called “foreign-to-foreign” mergers to control by the local competition authorities. Foreign-to-foreign mergers are mergers, takeovers or other acquisitions of control involving companies that are incorporated in other countries, but that nevertheless generate turnover on the local market, either through local subsidiaries or through cross-border direct sales.

36. Competition authorities should be aware of two problems that emerge in the international arena. Firstly, assessment decisions of the same transaction may differ between jurisdictions when there is a divergence in the standards of assessment or where dissimilar market conditions may lead to a different result even if the same substantive test is used. Secondly,

the application of varying pre-merger notification and clearance provisions to the same transaction imposes high transaction costs upon the notifying parties.[64] International cooperation can solve some of these concerns.

[64] Fox E (2008). Chapter 14: Competition Law. In: Lowenfeld A. *International Economic Law*. Second edition. Oxford University Press: 444.

Model Law on Competition (2010) – Chapter VII

The relationship between competition authority and regulatory bodies, including sectoral regulators

I. *Advocacy role of competition authorities with regard to regulation and regulatory reform*

An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies enjoying a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption. Such should in particular be the case if this regulation limits the independence and liberty of action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens.

In particular, regulatory barriers to competition incorporated in the economic and administrative regulation, should be assessed by competition authorities from an economic perspective, including for general-interest reasons.

II. *Definition of regulation*

The term “regulation” refers to the various instruments by which Governments impose requirements on enterprises and citizens. It thus embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which Governments have delegated regulatory powers.

III. *Definition of regulatory barriers to competition*

As differentiated from structural and strategic barriers to entry, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies, and by nongovernmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licences and other permits for starting business operations.

IV. *Protection of general interest*

Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms can be considered by governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.

COMMENTARIES ON CHAPTER I AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. A country's economic policy framework that reflects the often conflicting interests of various stakeholders is generally complex and in constant change due to the dynamic nature of economies. Competition law and policy that aim at minimizing economic inefficiencies created by anti-competitive behavior, form an important pillar of the policy framework of a market economy. As such, they are naturally subject to the interdependency and reciprocal influence that exists between the different parts of a country's policy framework and its translation into laws and other forms of regulation. In a democracy where pluralism of interests is the rule, tensions and frictions will necessarily arise between different economic policies and related norms, which will also influence the relationship between the respective enforcement bodies.

2. Against this background, Chapter VII of the UNCTAD Model Law on Competition is dedicated to the relationship between a country's competition authority and regulatory bodies, including sector regulators.

Definition of regulation

3. The Model Law on Competition has opted for a broad definition of regulation that covers various instruments by which governments impose requirements on enterprises and citizens. It embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which governments have delegated regulatory powers.

4. This broad definition of regulation encompasses all kind of norms expressing the hierarchic relationship between a state and its citizens in the various areas of life and is not limited to economic aspects. That is to say a country's competition law rules and rules applying to specific industry sectors would fall under the Model Law's definition of regulation in the same way as a country's criminal law, family law, or university regulation – to give just one example of a regulation by a self-regulatory body.

5. While all of these types of regulation may have a bearing on competition, regulation applying specifically to economic players is most relevant from the perspective of competition law and policy. While certain regulation in this field may apply across all industry sectors, for example tax law or corporate law provisions, so-called sector or industry specific regulation merits a particular emphasis.

Sector specific regulation

6. Sector specific regulation applies to particular industry sectors only. Traditionally, infrastructure service industries, such as energy, water, telecommunications and transport markets, have been subject to sector specific regulation. In a large number of countries, sector specific regulation actually preceded the introduction of competition law.

7. There are two main reasons why governments attach great importance to infrastructure service industries both in developed and developing countries and in economies in transition.

8. Firstly, these industries are fundamental to the performance of a country's economy, since they provide inputs for all other sectors of activity. Hence, they are sometimes referred to as the backbone of the economy. The state of their operations and their level of efficiency not only affect the general productivity and level of competitiveness of a country, but may also have an impact on social order and even political stability if consumers express general dissatisfaction. It follows from the essential nature of these industries that they are often subject to public or universal service obligations, which means that the infrastructure operators are required to provide a particular service even when it is not profitable for them to do so. In this respect, Chapter VII of the Model Law on Competition states under the heading "Protection of general interest", that "the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner." For the same reason, i.e. the protection of general interest, in almost all countries, it was traditionally the State that provided directly or through State-owned enterprises for infrastructure services. This situation has, however, changed in a number of countries due to privatization and liberalization reforms in the past three decades.

9. Secondly, infrastructure service industries are often characterized by the presence of natural monopolies, which means that, from an overall economic perspective, it is most efficient that one single operator provides the infrastructure service in question. Virtually all infrastructure service industries are network industries, where major investments would have to be made before a new network operator could enter the market. The costs for duplicating, for example, an electricity or water distribution network or a country's railway system are generally so high that they constitute insurmountable barriers to entry in the respective distribution markets.[65] As a result, infrastructure service industries are characterized by the preeminence of a small number of incumbent firms. In other words, infrastructure industries generally suffer from a lack of competition/market failure.

10. Sector specific regulation that addresses these two main characteristics of the infrastructure service industry may comprise the following features: (i) "technical regulation" - setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns, (ii) "access regulation" - ensuring non-discriminatory access to necessary inputs, especially network infrastructures; (iii) "economic regulation" -

[65] In this context, it is worth mentioning that the qualification of a certain market as a natural monopoly is not everlasting. Due to innovation and development, duplication of certain networks may become technically and commercially feasible over time and allow for new entry and the establishment of competition.

adopting cost based measures to control monopoly pricing; and (iv) "competition protection" - controlling anti-competitive conduct and mergers.[66]

Competitive impact of regulation

11. Before addressing the relationship between the competition authority and other regulators, including sector regulators, it appears necessary to shed some light on the interface between competition law and policy and regulation. While it is possible that competition law and policy and regulation co-exist without the latter having any bearing on competition, there are also situations where regulation produces effects on competition – in positive as well as in negative ways.

Compensating market failure

12. As mentioned above, industries that are subject to sector regulation are often characterized by natural monopolies and market failure. Therefore, one of the main objectives of sector regulation consists of mimicking competition in these industry sectors, e.g. through price regulation, which shall prevent the incumbent from charging excessive tariffs for its services, or through access regulation, which ensures that competition by downstream operators is not distorted and that a country's population has access to essential goods and services on a non-discriminatory basis. Sector regulation is typically viewed as aiming to alleviate market imperfections by substituting regulatory measures for the working of market forces. In addition, sector specific regulation may serve a number of additional legitimate objectives such as environmental safety or income redistribution goals, which may seem as lying outside the field of competition policy. As opposed to competition law, which mainly intervenes *ex post* (expect merger control), sector regulation applies *ex ante* and continuous. For example, price increases in regulated industries may be subject to prior approval by the specific regulator.

13. In a large number of countries, providers of infrastructure services which were traditionally under public ownership have been privatized in recent decades in order to remedy perceived inefficiencies of the respective industries and deficits of the public budget. Given the competitive features of infrastructure service industries, namely their restricted level of competition, sector specific regulation addressing these features is indispensable for successful privatization and liberalization processes.[67] In short, replacing a public monopoly by a private monopoly does not generate any efficiency gains, if not accompanied by further measures facilitating new entry and ensuring that the privately owned monopolist does not abuse its market power.

[66] Organization for Economic Cooperation and Development Policy Roundtable, Relationship between Regulators and Competition Authorities 1998.

[67] In this context, one should remember that a number of privatization and liberalization reforms in developing countries did not result in the expected outcome, because competition issues were insufficiently addressed during the reform process.

14. In this sense, regulation can play an important role in introducing and stimulating competition in specific industry sectors. In natural monopolies, it may even replace competition.

Regulatory barriers to competition

15. As indicated by the definition of regulatory barriers to competition provided for by the present chapter of the Model Law on Competition, regulation may, however, also have negative impacts on competition. Measures, which can negatively affect market entry, market exit and market operation, take a wide variety of forms, such as:

(a) Creating administrative hurdles, such as complex and lengthy authorization procedures, for the establishment of new market players;
(b) Requiring compliance with uncommon norms and standards amounting to barriers to market entry;
(c) Preventing foreign firms from competing in national markets;
(d) Privileging certain market players, for example national champions, and thereby awarding them a competitive advantage; and
(e) Arbitrary public procurement and state aid decisions which distort competition.

16. Recognizing the potentially detrimental impact of regulation on competition, some jurisdictions have adopted expressive provisions dealing with this issue.

Alternative approaches in existing legislation – Addressing regulatory barriers on competition

Country	
China	Chapter V of the Anti-monopoly Law of the People's Republic of China describes administrative barriers. Article 33 states that no administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative power to block the interregional free commodity trading by taking any of the following measures: (a) setting discriminatory charges, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities; (b) imposing technical requirements or inspection standards on non-local commodities that are different from those on their local counterparts, or taking discriminatory technical measures, such as repeated inspections or repeated certifications on non-local commodities, so as to restrict the entry of non-local commodities into the local market; (c) adopting the

	administrative licensing aimed at non-local commodities, so as to restrict the entry of non-local commodities into the local market; (d) setting up barriers or adopting any other means to block either the entry of non-local commodities or the exit of local commodities; or (e) other activities that may block the interregional free commodity trading. Article 35 forbids administrative organs – or organizations empowered by law or administrative regulation to administer public affairs – to abuse their administrative power to reject or restrict either investment in their jurisdictions or to establish local branches by non-local business operators by imposing unequal treatments on them that are different from those on the local business operators. Article 36 forbids administrative organs – or organizations empowered by law or administrative regulation to administer public affairs – to abuse their administrative power to compel business operators to engage in monopolistic activities that are prohibited by the Anti-monopoly Law of the People's Republic of China.
Germany	The German Act against Restraints of Competition addresses the issue that specific competition regulations by trade and industry association may contain restrictive provisions. According to Section 24 (2), competition rules of trade, industry associations and professional organizations are defined as provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of fair competition or effective competition based on performance, and of encouraging conduct in competition which is in line with these principles. The respective organizations and associations may apply to the Federal Cartel Office for recognition of competition rules, which has to check whether a notified competition rule violates any provision of German or European competition law. If this is not the case, the Federal Cartel office will issue a recognition, which implies that it will not challenge the notified regulation in the future.

The competition authority's role with respect to regulation

17. Taking into account the possible bearing of regulation on competition, Chapter VII of the Model Law suggests that the competition authority is awarded an advocacy role with regard to regulation and regulatory reform.

Advocacy

18. With respect to the design of sector regulation as part of a privatization or liberalization process, the advice of a competition authority is particularly valuable in ensuring that the newly created regulatory regime will indeed produce the expected outcomes in terms of enhanced efficiency. The expertise of a competition authority may, for example, be helpful to identify measures to facilitate new entry.

19. As to other forms of regulation, it is suggested that the competition authority is actively involved in the legislative process. This can, for instance, be realized by allowing the competition authority to comment on draft regulation or to submit an opinion on proposed regulatory reforms and projects.

20. Taking into account a competition authority's specific expertise, a number of competition law regimes expressively attribute to the competition authority an advocacy role on the legislative level.

Alternative approaches in existing legislation – Advocacy role of the competition authority

Country	
Indonesia	According to Article 35 e. of Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, the Indonesian Competition Authority KPPU shall "provide advice and opinion concerning Government policies related to monopolist practices and or unfair business competition".
Ireland	According to Article 30(1) of the Competition Act 2002, the Irish Competition Act has the following advocacy functions: *[…]* (c) to advise the Government, Ministers of the Government and Ministers of State concerning the implications for competition in markets for goods and services of proposals for legislation (including any instruments to be made under any enactment); (d) to publish notices containing practical guidance as to how the provisions of this Act may be complied with; (e) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions; (f) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; (g) to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition. Furthermore, the Minister may request the Authority to carry out a study or analysis of any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition and submit a report to the Minister in relation to the study or analysis; the Authority shall comply with such a request within such period as the Minister may specify in the request.

Chile	According to Article 18 (4) of the DL N° 211 of 1973, as amended by Law N° 20.361 of July 13 2009, the Competition Tribunal is empowered to propose to the President of the Republic, through the relevant State Minister, the modification or derogation of any legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the dictation of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions.

Competition law enforcement in regulated industry

21. Although not mentioned by the present chapter of the Model Law, it is worth noting that a competition authority may assume further functions with respect to regulated industries, namely enforcing general competition law provisions in regulated industries. The intensity of competition law enforcement in regulated industries mainly depends on two factors: firstly, the design of the interface between a country's competition law and its sector specific regulations; and secondly, on the relationship between the respective enforcement bodies.

Interface between competition law and sector regulation

22. In the event that a country opted for a specific sector regulation in addition to a general competition law regime, the question arises as to which law should govern competition issues in the regulated industries. There is no single answer to this question. A wide range of factors such as the social and economic context and the legal system may influence the design of the interface between the two legal regimes and the division of labour between the respective enforcement bodies. The characteristics of the regulated industry are also an important factor that has a bearing on the choice of regulatory framework, such that more than one approach might be employed within a country.

23. In fact, different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and the competition authority. These approaches can be classified into five types:[68]

I. To combine technical and economic regulation in the sector specific regulation and leave traditional competition law issue, such as the prohibition of anti-competitive conduct and merger control, to the competition law;

II. To combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects;

III. To combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects, while ensuring that the sector regulator performs its functions in coordination with the competition authority;

[68] See UNCTAD (2004). Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies. TD/B/COM.2/CLP/44. Geneva. 19 August 2004.

IV. To organize technical regulation as a stand-alone function for the sector regulator and include economic regulation into the general competition law;

V. Rely solely on competition law enforced by the competition authority.

Institutional set-up

24. Whereas some countries, e.g. the Netherlands and Peru, have opted for an integrated agency that is empowered to enforce both sector regulation and competition law, most countries established competition authorities and sector regulators as separate enforcement entities. Often, sector regulators actually preceded the establishment of competition agencies. In the second case, jurisdictional conflicts often belong to the enforcement reality, if respective competences of the competition authority and the sector regulators are not clearly defined by law. In order to prevent/remedy such jurisdictional frictions, a memorandum of understanding between the separate enforcement entities may offer a solution.

Alternative approaches in existing legislation – Interface between competition authority and sector regulators

Country	
	Integrated agency model
The Netherlands[69]	The Netherlands Competition Authority (NMa) is attributed general competition law enforcement as well as industry-specific regulation in the areas of energy and transport. Its enforcement powers are laid down in the Competition Act, the Electricity Act 1998, the Gas Act, the Passenger Transport Act 2000, the Railway Act and the Aviation Act. According to the organizational structure of the NMa, which is referred to as a "chamber model", industry-specific regulation and monitoring tasks lie with the Office of Energy and Transport Regulation, a particular chamber within the NMa. Other sector specific regulation is administered by separate enforcement bodies, such as the Independent Post and Telecommunications Authority, with which the NMa cooperates and coordinates.
	Separate enforcement entities with expressively attributed jurisdictions
Germany	The German Act against Restraints of Competition contains specific rules for certain industries (agriculture, energy and press), which complement the general competition rules in these areas; see chapter 5 of the Act: "Special provisions for certain sectors of the economy". Furthermore, the electricity, gas, telecommunications, postal and railway infrastructure markets are specifically regulated. The general competition

[69] Source: http://www.nmanet.nl/engels/home/index.asp.

	rules apply to the regulated industries as long as the sector regulations do not provide for an exhaustive regulation of the specific matter, see e.g. section 2(3) TKG and section 111(3) EnWG. The jurisdiction of the Federal Cartel Office is not altered by the sector specific regulation, which provides for specific rules on the cooperation between the Federal Network Agency, the sector regulator and the Federal Cartel Office. The respective provision of the Telecommunications Act (section 2(3) TKG) reads as follows: "The provisions of the Act against Restraints of Competition remain applicable as long as this law does not expressively provide for an exhaustive regulation. The tasks and competences of the cartel authorities remain unaffected."
United Kingdom	The Office of Fair Trading and sector regulators have concurrent jurisdiction. The Competition Act 1998 (Concurrency) Regulations 2004 spell out the procedure by which it is decided which authority is better/best placed to deal with a case, and settlement procedures in the event of a dispute. The relevant provisions read as follows: *"Determination of the exercise of prescribing functions* *"4. - (1) If a competent person proposes to exercise any of the prescribed functions in relation to a case and he considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in relation to that case, he shall inform that other competent person of his intention to exercise prescribed functions in relation to that case.* *" (2) Where a competent person has informed another competent person of his intention to exercise prescribed functions in accordance with paragraph (1) in relation to a case all such competent persons (together "the relevant competent persons") shall agree who shall exercise prescribed functions in relation to that case.* *"(3) When agreement has been reached in accordance with paragraph (2), the case shall be transferred to the competent person who is to exercise prescribed functions in relation to that case and the OFT shall as soon as practicable inform in writing the relevant competent persons which competent person is to exercise prescribed functions in relation to the case.* *"Dispute* *"5. - (1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the OFT shall inform the Secretary of State in writing.* *"(2) Any relevant competent person may make representations in writing to the Secretary of State no later than the date upon which the OFT informs the Secretary of State in accordance*

	with paragraph (1) of the failure to reach agreement. *"(3) The Secretary of State shall within 8 working days of receipt of a communication made in accordance with paragraph (1) -* *"(a) determine which competent person shall exercise prescribed functions in relation to the case and direct that the case shall be transferred to that competent person; and* *"(b) inform in writing all relevant competent persons which competent person is to exercise jurisdiction in relation to the case and the date of transfer of the case.* *"(4) In making a determination in accordance with paragraph (3)(a) the Secretary of State shall take into consideration any representations made in accordance with paragraph (2)."*
Separate enforcement entities without expressive repartition of competences	
Mauritius	Mauritian competition law requires that the competition commission and specific sector regulators enter into a memorandum of understanding governing their respective competences. The relevant provision of the Mauritian Competition Act No. 25 of 2007 reads as follows: *"66. Memorandum of Understanding between Commission and regulators* *"The Commission and regulators shall enter into a memorandum of understanding governing the effective exercise of their respective responsibilities and establishing mechanisms for practical cooperation in the exercise of those responsibilities, including the use of the sector-specific expertise of the regulators in respect of investigations under this Act."*
South Africa	Sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly defers to other regulation nor explicitly claims precedence over it. The competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulators have an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). In 2004, the competition authority had agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters. The relevant provisions of the South African Competition Act read as follows: *"3. Application of Act*

	"This Act applies to all economic activity within, or having an effect within, the Republic, except – *[…]* *"(1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.* *"The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).* *"21. Functions of Competition Commission* *"The Competition Commission is responsible to –* *[…]* *"(h) negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;* *(i) participate in the proceedings of any regulatory authority;* *(j) advise, and receive advice from, any regulatory authority;* *[…]* *"82. Relationships with other agencies* *"(1). A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector –* *"(a) must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and* *"(b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.* *"(2) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.* *"(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must -* *"(a) identify and establish procedures for the management of areas of concurrent jurisdiction;* *"(b) promote cooperation between the regulatory authority and the Competition Commission;* *"(c) provide for the exchange of information and the protection of confidential information; and* *"(d) be published in the Gazette.* *"(4) The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency."*

Model Law on Competition (2010) – Chapter VIII

Some possible aspects of consumer protection

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

COMMENTARIES ON CHAPTER VIII AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. While consumer protection and competition policies share a common goal, which is the promotion of consumer welfare, the two policies address this goal from different perspectives, and there are important differences in how the two policies are executed.

2. Before dealing with the relationship between consumer protection and competition laws and policies, which is addressed by Chapter VIII of the Model Law on Competition, it appears useful to provide some basic information on consumer protection.

Rationale for and contents of consumer protection legislation

3. Consumer protection legislation is based on the finding that consumers often face imbalances in economic terms, educational levels and bargaining power, compared to the companies they deal with. Therefore, the typical consumer protection law seeks to correct or compensate for this weaker position and thereby contribute to consumer welfare. The ways to achieve this objective differ significantly between different countries. Indeed, it can be stated that consumer protection legislation is much more diverse than competition laws. According to the United Nations Guidelines for Consumer Protection,[70] which provide some guidance for the design of consumer protection legislation, it is recommended that such legislation address the following aspects:

> "(a) The protection of consumers from hazards to their health and safety;
>
> (b) The promotion and protection of the economic interests of consumers;
>
> (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
>
> (d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
>
> (e) Availability of effective consumer redress;

[70] United Nations Guidelines for Consumer Protection (as expanded in 1999), available at: http://www.un.org/esa/sustdev/publications/consumption_en.pdf.

(f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;

(g) The promotion of sustainable consumption patterns."

4. Below, we provide some examples of how these different aspects can be translated into consumer protection legislation.

Product safety regulation

5. For some time now, one of the key issues in consumer protection legislation has been product safety. Product safety regulation has grown out of consumers' growing expectations about the quality of the products that are supplied to them. National safety regulations are complemented by national or international standards, voluntary standards, and the maintenance of safety records, to ensure that products are safe for either intended or normally foreseeable use. Australia may be quoted as an example of a country with a well-designed enforcement system for product safety regulation. Since 2008, the Australian Consumer and Competition Commission (ACCC) has enjoyed new powers to promote product safety, including the power to issue infringement notices, the power to rapidly publish product safety warnings, and the power to disqualify managers of corporations (for example) which sell or produce products that do not comply with mandatory safety rules.[71]

Protection from false or misleading information

6. Generally, the traditional purview of consumer protection legislation is the prevention of unfair trade practices. In this regard, there is much legislation preventing businesses or trade associations from disseminating false or misleading information about a product, whether on the label of the product or via a marketing campaign. For example, the Barbados Consumer Protection Act broadly states that "a person shall not, in trade or commerce as a supplier, engage in conduct that is, or is likely to be, misleading or deceptive." The legislation goes on to list a number of situations that could be deemed "misleading" or "deceptive", for example, falsely representing that goods are of a particular standard; falsely representing that goods have a certain performance characteristic; misleading representations about the existence of conditions, warranties, rights or remedies in relation to a good or service.[72]

Control of standard contract terms

7. In some industries, businesses use standard form contracts with mandatory terms included that essentially compel a customer to accept the terms; the freedom of the consumer to contract and exercise his or her choice is therefore limited. Some countries have adopted regulations, for specified sectors, that dictate the compliance of business with standardized/model contracts. Other jurisdictions provide for a specific procedure in order for those standard contract terms to be incorporated into a consumer contract, and allow for in-depth control of the respective terms by a judge. For instance, in line with the European Union's Unfair Contract Terms Directive,[73] the German Civil Code requires that, prior to concluding a consumer contract, the consumer be made aware of the incorporation of

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[71] Australian Trade Practices Act 1974, Act No. 51 of 1974 as amended. Also, for more information on how the reforms were introduced, see: http://www.productsafety.gov.au/content/index.phtml/tag/ChangesInLegislation.

[72] Barbados Fair Competition Act 2002-19, CAP.326C, Sections 12 and 13.

[73] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. 1993 L95/29.

standard terms into the contract, and that he or she be given the possibility to read the relevant standard terms. Furthermore, standard contract terms in consumer contracts can be examined by a judge and declared void if they are unfair.[74] This control of contract terms constitutes a limitation on freedom of contract.

Information disclosure requirements

8. Given the need of consumers to have access to sufficient information in order to make an informed choice about the products and services they would like to purchase, and taking into account the imbalance of information between consumers and producers/distributors, it may be appropriate to mandate information disclosure by the latter. For example, a rule can be designed to ensure that specified, critical information is available to consumers, allowing consumers to make more informed decisions about which product or service to purchase. One example of a very common disclosure requirement is compulsory labelling of products. Food, in particular, often needs to be labelled in a very detailed way, providing information that is crucial for consumers' health.

9. If rules are focused on information availability, rules or systems must also be created so that the consumer can process the complex information that is available to him or her. In designing rules, it should be remembered that information is not always key, as information overload can simply promote confusion and inertia. To complement an information disclosure rule, lawmakers can design functional systems which help consumers to process the information, and which can also be used for getting tips and tools to consumers.

10. For example, the EU's Consumer Scoreboard is a system which investigates and monitors markets from the perspective of the consumer. An Annual Consumer Scoreboard Report is prepared, which provides information on price, complaints, safety, satisfaction and switching in consumer retail markets. Data and attitudes of consumers vis-à-vis cross-border trade with a view to tracking progress in retail market integration are catalogued; data are also catalogued on enforcement, redress, and the handling of complaints, with the aim of establishing consumer conditions at the EU level and the Member State level. The data are collected using EU-wide surveys and are then processed and analysed. The data from the scoreboard are expected to help in the enforcement of existing legislation and in the design of targeted codes of conduct for businesses, and will also be used to empower consumers with clear and manageable information, to make choices, avoid fraud and exercise their rights.[75]

Mandatory codes of conduct or rules of behaviour

11. In addition to mandating certain rules of behaviour, there appears to be a growing trend towards encouraging businesses to self-regulate, subject to the approval of the consumer protection agency.

12. For instance, the United Kingdom's Office of Fair Trading (OFT) Consumer Codes Approval Scheme (CCAS) grants its approval to groups of businesses, via their trade association, that voluntarily undertake a code of conduct that promotes or protects consumer interests, and which meets with the criteria set by the OFT to govern the scheme. Effectively, trade associations draft self-regulatory rules aimed at addressing specific consumer concerns, such as the need for pre-contractual information disclosure, truthful advertising and labelling, and fair contractual terms and conditions. The code is submitted to the OFT, and in order to secure the OFT's "seal" of approval, certain core criteria must be met; for example, membership must include a majority of the firms in a sector; observation and compliance with

[74] See sections 305 to 310 of the German Civil Code (Bürgerliches Gesetzbuch).

[75] Communication from the European Commission, "Monitoring consumer outcomes in the single market: the Consumer Markets Scoreboard", 29 January 2008, COM(2008) 31 final.

the code must be mandated for all members; code sponsors should have access to adequate funding and resources to accomplish the objectives of the code, and they must also be able to demonstrate that organizations representing consumers, as well as enforcement bodies, were consulted throughout the preparation of the code.[76]

13. In Japan, the Premiums and Representation Act also provides for self-regulation. Its Article 12 states that "[an] entrepreneur or a trade association may, upon obtaining authorization from the Fair Trade Commission pursuant to the Rules of the Fair Trade Commission, with respect to the matters relevant to premiums or representations, conclude or establish an agreement or a rule, aiming at prevention of unjust inducement of customers and securing fair competition. The same shall apply in the event alterations thereof are attempted."[77]

Functioning of competition and consumer protection legislation

14. As mentioned earlier, while competition and consumer protection legislation share a common goal, which is to promote consumer welfare, this goal is achieved in different ways. Competition law promotes a range of choices/options in services and goods available to the consumer through the protection of competition; whereas consumer protection law gives access and freedom to select among the available choices/options. The two policies address the same goal from different perspectives. Competition law uses a set of rules, in a general and uniform manner, to bring about benefit to the market as a whole; consumer protection law uses targeted rules, addressed at specific sectors sometimes, to create a more empowered and advantaged consumer. Whereas competition law prioritizes market competitiveness, consumer protection law is not preoccupied with the level of competition in a market.

15. Competition law rules are squarely directed at the market and are designed around regulating the way firms compete with each other in a market, with a view to promoting competition among firms and thereby enhancing consumer choice. Consumer protection law has a more diverse range of rules, which address the conduct of firms and the standards by which they operate, and the rules of engagement between individual businesses and consumers, with a view to promoting access to goods and services, promoting greater quality in the choice available, and ensuring consumer access to reliable and undistorted information to assist the consumer in making that choice. Whereas the benefit of competition law is usually quantified in economic terms, the benefit of consumer protection law can be economic, and it can also engender non-economic quantities of value such as the safety and health of the consumer. The subjects of the rules are therefore sometimes different.

16. As a matter of general application of the law, competition laws have an applicable limit in the sense that competition rules of exclusionary conduct and collusion cannot be manipulated to bring about change in a particular sector or in the structure of a particular market. The rules are generally applied uniformly across the board. Consumer protection laws, on the other hand, can be used to impose rules of behaviour on firms in a particular sector to give consumers better information on choice, access to safer goods, and redress in the case of misleading contract terms. In addition, consumer protection law is rights protection at the level of the individual transaction, providing rights protection against a range of abuses; whereas competition law occurs at the level of the marketplace, carrying out its agenda by

[76] Office of Fair Trading "Consumer Codes Approval Scheme. Core Criteria and Guidance", OFT 390, March 2008.

[77] Act Against Unjustifiable Premiums and Misleading Representations, Law No.134 of 1962.

promoting consumer interests not at the transactional level but at the level of firms in the relevant market.

17. With respect to the design of remedies, it is important to note that consumer protection law remedies can be far more targeted than competition law remedies; the remedies of consumer protection law, like the prescribed rules, can go beyond fines and prohibition of conduct. A wider array of tools can therefore be employed in this regard. For example, restitution via compensatory damages is one option; so too are prevention and deterrence via fines, punishment via imprisonment, and suspension of business licences. As regards restitution in particular, since consumer protection law is usually grounded in principles of fairness and balance of rights, restitution will be one of the more effective remedial tools. For example, restitution,allows remedies to develop in a less rigid manner, allowing for the particular facts of the case to dictate an equitable outcome for both the firm and the consumer. As a general guide to remedy design, it should be noted that one key element in determining the choice of remedy in consumer protection law appears to be that the magnitude of the sanction must outweigh the opportunistic infringing conduct.[78]

18. While acknowledging the different modes of functioning of consumer protection and competition laws, it should be remembered that competition issues are closely related to protection of consumers' economic interests. In fact, Canada has acknowledged how the policies enhance each other:

19. "The reference to consumers in the purpose clause of the Competition Act reflects Parliament's appreciation that a properly functioning marketplace requires not only enforcement against market power abuses, but also transparency in information provided to consumers to promote well-informed purchasing decisions. Hence, consumer and competition policy are mutually reinforcing […]"[79]

The interface between consumer protection and competition law

20. Given the common goals of consumer protection and competition policy and law, and taking into account their significantly different ways of functioning, the question arises of how to design their interface, both on the legislative and the enforcement level.

Legislative level

21. Chapter VIII of the Model Law on Competition states that in a number of countries, consumer protection legislation is separate from competition legislation. In fact, the present trend in countries adopting such legislation seems to be the enactment of two separate laws – one on competition and the other on consumer protection. For example, in young competition regimes, such as those of Barbados and Jamaica, and at the Community level in CARICOM, competition law and consumer protection law are dealt with under separate legislation. The same applies to Switzerland. In some countries and regions, however, such as Australia, France, Hungary and Poland, and in CARICOM's regional law, the competition law contains

[78] Cseres K (2009). Competition and consumer policies: Starting points for better convergence. Amsterdam Centre for Law and Economics working paper no. 2009-06. 1 April. Available at: http://ssrn.com/abstract=1379322.

And: Garoupa N (1997). The theory of optimal law enforcement. 11 Journal of Economic Surveys, 267–296.

[79] OECD Global Forum on Competition (2008). The interface between competition and consumer policies. DAF/COMP/GF(2008)10. 5 June.

a chapter devoted to consumer protection. This is also the case, for example, in Lithuania and in the Bolivarian Republic of Venezuela, where the competition laws contain regulations on “unfair trade practices”. In Canada, the Competition Act contains provisions dealing with misleading advertising and deceptive marketing practices. These provisions are designed to ensure that consumers are provided with basic, uniform and accurate information on certain consumer products, and to proscribe deceptive and false representations.

Enforcement level

22. The approach reflected by the Model Law on Competition – that of drafting two separate laws – does not prevent a coordinated approach to policy development, and although consumer protection legislation may be developed separately from consumer protection legislation, the laws can be enforced in a coordinated way, which allows the policies to complement and enhance one another. Also, because of the links between the two bodies of law, the administration of these laws is often the responsibility of the same authority. This is the case, for example, in Algeria, Australia, Colombia, Costa Rica, Finland, France, New Zealand, Panama, Peru, Poland, the Russian Federation, Sri Lanka, the United Kingdom and the United States, and in Hungary and Italy[80] at least to a certain extent.

23. In other jurisdictions, the administration of competition and consumer protection laws is attributed to different authorities. For instance, in Estonia, consumer protection legislation and the Consumer Protection Authority are separate from competition legislation and the Competition Board. However, the Estonian Competition Act also contains provisions on unfair trade practices. Contraventions of these provisions are determined by a civil court. In Zambia, consumer protection legislation is covered under section 12 of the Competition Law. However, it does not deal with specific matters of consumer welfare, such as public health, standards, sales, and hire purchase. Therefore, in administering consumer protection, the Competition Commission works closely with other bodies such as local authorities, the Bureau of Standards, and the public health service.

24. The trend in institutional design seems to be to house the consumer protection agency with the competition authority. Indeed, there appear to be far more countries housing their competition authorities with their consumer protection agencies – even though a separate department is created for each agency in most instances, for example Australia, Barbados, Canada, France, Jamaica, Japan, Malta, Papua New Guinea, Poland, the Republic of Korea, and the United States, to name a few. Designing a competition authority of dual competence – competition law enforcement and consumer protection – could create synergies if there is effective coordination. For example, dual competence of an agency gives rise to centralized management, operational efficiencies, case teams with a range and diversity of disciplines, and the efficient use of available expertise. Of course, there are disadvantages, too, for while the two areas of law are similar, it is sometimes difficult to coordinate the procedures for a law that applies at the individual consumer level with those for a law that applies at the market level; and it is sometimes difficult to coordinate the laws at the case level.[81] Despite the trend towards dual competence, there is nothing to prevent lawmakers from housing the agencies separately. It should also be noted that even in cases where there are separate

[80] In order to protect the interests of consumers and to foster fair market practices, the Hungarian Parliament, in 2008, implemented the Unfair Commercial Practices Directive 2005/29, which was incorporated into Hungarian law by Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices. In accordance with the provisions of the Act, there are three different authorities that are responsible for consumer protection: the Hungarian Competition Authority (GVH), the Hungarian Financial Supervisory Authority (PSZÁF), and the Hungarian Consumer Protection Authority (NFH).

[81] OECD Global Forum on Competition (2008). The interface between competition and consumer policies. DAF/COMP/GF(2008)10. 5 June.

agencies, it is possible to coordinate the activities of both agencies through the establishment of an oversight committee or a central commission, which seats representatives from the competition authority and from the consumer protection agency, as well as individuals from other government departments and ministries.[82]

[82] ibid.

Introduction

1. There are a number of design choices available for the composition, structure and responsibilities of the Authority responsible for competition. In most jurisdictions, the structure of the competition Authority and the allocation of decision-making responsibilities within the administrative and judicial systems generally fall into one of three structural models:[83]

(i) The bifurcated judicial model – the Authority is empowered to be investigative, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts.

(ii) The bifurcated agency model – the Authority is empowered to be investigative, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts.

(iii) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies.

I. The establishment of the Administering Authority and its title.

2. Many member States have adopted variations on – or combinations of – these basic structural models. For instance, a common arrangement is for the Authority to enjoy both investigative and adjudicative functions in relation to mergers and concentrations, but only an investigative role in relation to restrictive trade practices and abuses of dominance, with courts or specialized tribunals undertaking the adjudicative function.

3. Each of these models also involves certain trade-offs. For instance, the bifurcated agency model may improve the quality of decision-making by concentrating adjudication in a small group of specialized and expert judges. On the other hand, this model may be unacceptably resource-intensive where courts of general jurisdiction provide a ready alternative, and may also raise natural justice or due process concerns if access to general courts is limited. The integrated agency model may be the most administratively efficient enforcement scheme, but it raises significant due process risks which must be safeguarded against.

4. In some cases, there has been a merging of different bodies into one body empowered with all functions in the areas of restrictive business practices, consumer protection and corporate law, for example in Colombia,[84] Peru[85] and New Zealand.[86] Vesting a single

[83] Trebilcock M and Iacobucci EM. Designing competition law institutions: values, structure and mandate. 41 *Loyola University Chicago Law Journal* 455.

[84] In addition to competition issues, the Superintendency is responsible for administration of the following legislation: patents, trademarks, consumer protection, chambers of commerce, technical standards and metrology. See Article 3 of Decree 2153 of 30 December 1992 on the Superintendency of Industry and Commerce.

[85] According to Article 2.1 of Legislative Decree No. 1033, the National Institute for the Safeguard of Competition and the Protection of Intellectual Property (INDECOPI) is responsible for the implementation of legislation relating to the following areas: competition, anti-dumping and subsidies, consumer protection, advertising, unfair competition, metrology, quality control and non-tariff barriers, bankruptcy procedures, trademarks, patents, plant varieties, appellations of origin and transfer of technology.

Authority with a broad regulatory mandate may assist with maintaining integrity and coherence in enforcement policy.

5. Alternatively, some countries have opted for several agencies exercising either separate or overlapping enforcement jurisdictions, for example China and the United States. While this is administratively complex, overlapping jurisdictions may ensure more rigorous enforcement, by making it harder for industry to influence or capture the Authorities.

6. In addition, some countries also permit private enforcement, and, in some cases, actively incentivize it (for example, treble damages actions in the United States). Private enforcement enables those most affected by anti-competitive behaviour to take action of their own volition, rather than relying on the Authority, which may be resource-constrained or have different enforcement priorities.

7. It is not possible to state authoritatively how the Authority should be structured and integrated into the administrative or judicial machinery of a given country. This is a matter for each country to decide. In fact, a number of countries have decided not to establish an independent competition Authority, but to implement their competition policy through a dedicated ministerial department. However, there is a growing consensus as to the desirability of establishing independent agencies with responsibility for competition enforcement. The Model Law on Competition has been formulated on the assumption that probably the most efficient type of administrative Authority is one which is a quasi-autonomous or independent body of the Government, and which has strong judicial and administrative powers for conducting investigations and applying sanctions etc., while at the same time providing for the possibility of recourse to a higher judicial body.[87]

8. The trend in most of the competition authorities created in the recent past (usually in developing countries and countries with economies in transition) is to award them as much administrative independence as possible. This feature is very important, because it protects the Authority from political influence.

9. Administrative independence has three main axes: (i) independence in decision-making; (ii) budgetary independence; and (iii) personnel independence. Independent decision-making requires that the Authority be insulated from governmental involvement or influence (and, equally, from influence from external non-governmental actors) when making specific enforcement decisions. However, there is still a role for government in setting competition policy at the general rather than the case-specific level. Budgetary independence ensures that funding does not become a tool for influencing the Authority's decisions. Personnel independence requires that the Authority's staff be employed by the Authority itself, rather than by a government ministry. The level of independence on these three axes enjoyed by the competition authorities of member States varies.

10. Regardless of the structural model that a country has opted for, it needs to ensure that its competition law enforcement system produces the desired outcome. Under the heading of "agency effectiveness", some work has been undertaken in recent years to assess the criteria for a well-functioning and results-delivering competition authority. In order to improve their

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[86] The Commerce Commission is an independent Crown entity established under section 8 of the Commerce Act 1986. It enforces legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders. The Commission also enforces a number of pieces of legislation which, through regulation, aim to provide the benefits of competition in markets where effective competition does not exist, for example in the telecommunications, dairy, electricity, gas pipelines and airport sectors. See http://www.comcom.govt.nz/about-us/.

[87] For additional information, see the note by the UNCTAD secretariat entitled "Independence and accountability of competition authorities". TD/B/COM.2/CLP/67. 14 May 2008.

effectiveness, competition authorities may undergo different forms of evaluation aiming at identifying weaknesses and finding ways to improve these.[88]

Alternative approaches in existing legislation – Institutional design of competition Authority

Country	
Bifurcated judicial model	
Australia	The Australian Competition and Consumer Commission (ACCC) is responsible for investigating infringements of the Trade Practices Act 1974 (TPA) and may institute legal proceedings in the Federal Court against businesses that it believes have contravened the TPA. The Federal Court is empowered to hear and determine competition matters.
Jamaica	Jamaica's Fair Trading Commission has the power to carry out investigations in relation to the conduct of business in Jamaica to determine if any enterprise is engaging in practices that are in contravention of the Fair Competition Act. Upon application by the Fair Trading Commission, the Supreme Court may (a) order the offending person to pay to the Crown such pecuniary penalty not exceeding one million dollars in the case of an individual and not exceeding five million dollars in the case of a person other than an individual; or (b) grant an injunction restraining the offending person from engaging in anti-competitive conduct; see Article 47 of the Fair Competition Act.
Bifurcated agency model	
South Africa	The South African institutional system for competition law enforcement comprises three bodies: the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The functions of the South African Competition Commission, pursuant to section 21 of the South African Competition Act (the Act), include investigating anti-competitive conduct in contravention of Chapter 2 of the Act; assessing the impact of mergers and acquisitions on competition and taking appropriate action; monitoring competition levels and market transparency in the economy; identifying impediments to competition; and playing an advocacy role in addressing these impediments.

[88] For further information on this topic, see the note by UNCTAD secretariat entitled "Criteria for evaluating the effectiveness of competition authorities". TD/B/COM.2/CLP/59. 26 April 2007.

Country	
	According to section 27 of the Act, the South African Competition Tribunal may – (a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act; (b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act; (c) hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; and (d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act. Decisions of the Competition Tribunal may be appealed to the Competition Appeal Court.
Chile	The Fiscalía Nacional Económica (FNE, or National Economic Prosecutor) is the Chilean competition enforcement agency, which investigates competition infringements and brings cases before the "Tribunal de Defensa de la Libre Competencia" (TDLC, or the Competition Court) or other courts of law as a party. The TDLC is an independent court of law that has jurisdiction on competition matters, with adjudicative powers, subject to the supervision of the Supreme Court of Justice
Integrated agency model	
European Union	The European Commission is empowered to investigate and adjudicate potentially anti-competitive practices and mergers that may affect trade between EU Member States. See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
China	Article 9 of the Anti-Monopoly Law of the People's Republic of China provides that the State Council shall establish an Anti-Monopoly Commission, which is responsible for organizing, coordinating and guiding the anti-monopoly work, and that the composition and working rules of the Anti-Monopoly Committee shall be established by the State Council.

Country	
	Besides, Article 10 stipulates that the Anti-Monopoly Enforcement Agency designated by the State Council (hereinafter referred to as the Anti-Monopoly Law Enforcement Agency under the State Council) shall be responsible for the anti-monopoly law enforcement work. The Anti-Monopoly Law Enforcement Agency under the State Council may, as required by the work, empower corresponding agencies in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to be responsible for anti-monopoly law enforcement work, according to this Law.

II. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the Authority responsible for their appointment.

11. The number of members of the Authority differs from country to country. Under some legislation, the number is not fixed and may vary within a minimum and maximum number, for example in Switzerland[89] and India.[90] Other countries state in their legislation the exact number of members, for example Algeria, Argentina, Brazil, Bulgaria, Costa Rica, Côte d'Ivoire, Malta, Mexico, Panama, Peru, Portugal, the Republic of Korea and the Russian Federation. Other countries, such as Australia, have left the choice of the number of members to the government/responsible minister.

12. There are a number of appointment methods employed by different countries. In many countries, the law leaves the appointment of the Chair and the members of the Commission to the highest political authority (e.g. the president). In other countries, the law provides that a senior government official is designated to make the appointments. In some countries, such as India and Malta, it is obligatory to publish the appointments in the official gazettes, for public knowledge. Some legislation establishes the internal structure and the functioning of the Authority, and establishes rules for its operation, whereas other legislation leaves such details to the Authority itself.

III. Qualifications of persons appointed.

13. Successful competition law enforcement requires a broad range of skills to come together: legal expertise, economic expertise, public administration skills, regulatory enforcement experience and specific industry knowledge. Ideally, the members of the

[89] According to Article 18 (2) of the Federal Act on Cartels and Other Restrictions to Competition Act, the Competition Commission has between 11 and 15 members.

[90] According to Section 8 (2) of the Competition Act 2002, the Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government.

Authority should collectively demonstrate a high level of expertise in these areas. Several laws establish the qualifications that any person should have in order to become a member of the Authority. For example, in Brazil, members of the Administrative Economic Protection Council are selected from citizens reputed for their legal and economic knowledge and unblemished reputation.[91] In Pakistan, members of the Competition Commission must be known for their integrity, expertise, eminence, and experience for not less than 10 years in any relevant field, including industry, commerce, economics, finance, law, accountancy and public administration.[92]

14. In a number of countries, the legislation states that the persons in question should not have interests which would conflict with the functions to be performed. In India, for example, a person should not have any financial or other interest likely to affect prejudicially his functions. In Germany, members must not be owners, or chairmen or members of the board of management or supervisory board of any enterprise, cartel, trade industry association, or professional association. In Hungary, the president, vice-presidents, Competition Council members and other civil servant staff members of the competition Authority may not pursue activities for profit other than those dedicated to scientific, educational, artistic, authorial and inventive pursuits, as well as activities arising out of legal relationships aimed at linguistic and editorial revision, and may not serve as senior officials of a business organization or members of a supervisory board or board of directors.[93] Similar provisions are included in the Italian and Mexican legislation. In Chile, personnel with permanent and fixed-term contracts at the National Economic Prosecutor's Office shall have exclusive dedication to performing their duties in the Service. These posts shall be incompatible with any other function of the State Administration, and the staff shall not render services as dependent workers or carry out professional activities for individuals or legal entities that could be subject to action by the Service.[94]

15. Some countries appoint representatives of stakeholder industries, associations (e.g. professional or trade associations) or groups (e.g. labour groups/unions) to the membership of the Authority. This has the advantage of importing direct industry experience into the Authority, but conversely may become a conduit through which industry can unduly influence enforcement policy.

IV. The tenure of office of the Chair and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.

16. The tenure in office of the members of the Administering Authority varies from country to country. At present, members of the Administering Authority are appointed in Mexico for 10 years, in Italy for 7 years, in Hungary for 6 years, in Armenia and Indonesia for 5 years, in Argentina for 4 years, in Brazil for 2 years, and in other countries, such as Switzerland, for an indefinite period. In many countries, members have the possibility of being reappointed, sometimes, however, only for a single time.

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[91] Article 4 Federal Law n° 8884 of 1994 on the Competition Defense System.

[92] Section 14 (I) 5 of the Ordinance XVI OF 2010.

[93] Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Article 40 (1).

[94] Article 38 of Decreto Ley No. 211 of 1973, as amended by Law No. 20.361, published in the Official Gazette on 13 July 2009.

V. Removal of members of the Authority.

17. Administrative independence requires that the members of the Authority be protected from removal from office for political reasons. In general, therefore, members of the Authority should be removed before their tenure expires only for cause.

18. Legislation in several countries provides an appropriate Authority with powers to remove from office a member of the Administering Authority that has engaged in certain actions or has become unfit for the post. For example, becoming physically incapable is a reason for removal in Japan, Serbia, South Africa and the United Republic of Tanzania; becoming bankrupt, in Japan, Malawi, Malta and Singapore; and being absent from duty except on leave for a specified period, in Australia. In Mexico, commissioners can only be removed "for a duly substantiated serious" failing in the obligations that one acquires as a member of the Administering Authority. Another cause for removal is being sentenced to disciplinary punishment or dismissal, for example in Hungary.[95] The procedure for removal varies from country to country.

VI. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

19. In order to protect the members and officers of the Administering Authority from prosecution and claims, full immunity may be given to them when carrying out their functions. In Pakistan, for example, the Authority and any of its officials or servants have immunity against any lawsuit, prosecution or other legal proceeding for anything done in good faith, or intended to be done, under Pakistani competition law.[96]

20. Immunity from lawsuits should not prevent affected citizens or companies from taking legal action against the Authority itself (rather than its members) for alleged breaches of the law or excesses of authority.

VII. The appointment of necessary staff.

21. There are variations in the way that staff of the Administering Authority are appointed. In some countries, the Administering Authority appoints his own staff. In others, the government has this power. As mentioned earlier, administrative independence requires the Authority to have the power to appoint and employ personnel. Consequently, countries that emphasize independence allow the Authority to appoint and employ its own personnel.

[95] Article 34/A of Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

[96] Article 46 of Ordinance XVI of 2010.

COMMENTARIES ON CHAPTER X AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. Most competition legislation establishes a list of the functions and powers that the Authority possesses for carrying out its tasks, and that provide a general framework for its operations. An illustrative list of functions of the Authority is contained in Chapter X of the Model Law on Competition. It is important to note that all these functions are related to the activities that the Competition Authority or competition enforcement agency might develop, as well as the means usually at its disposal for carrying out its tasks. A common feature is that the Authority's functions must be based on the principle of due process of law, as well as transparency.

(a) Making inquiries and investigations, including as a result of receiving complaints;

2. The Authority may act on its own initiative, or may follow certain indications that the anti-competitive practice exists, for example as a result of a complaint made by any person or enterprise. The United Nations Set of Principles and Rules on Competition specifies that States should institute or improve procedures for obtaining information from enterprises necessary for their effective control of restrictive business practices.[97] The Authority should also be empowered to order persons or enterprises to provide information and documents, and to call for and receive testimony.

3. In the event that this information is not supplied, it may be appropriate to obtain a search warrant or a court order, where applicable, in order to require that information be furnished and/or to permit entry into premises where information is believed to be located. In many countries, including Argentina, Australia, Germany, Italy, Hungary, Norway, Pakistan, Peru and the Russian Federation, as well as in the European Union, the Administering Authority has the power to order enterprises to supply information and to authorize a staff member to enter premises without announcement in search of relevant information (so-called dawn raids). However, entry into premises may be subject to certain conditions. For example, in Argentina, Austria or Germany, a court order is required for entry into private dwellings. In Turkey, in cases where an on-the-spot inspection to obtain copies of information, documents, books and other instruments is hindered or is likely to be hindered, a magistrate can order that an inspection be performed. In Poland, in cases of utmost urgency where there is a justified suspicion of a serious violation of the competition law, and particularly if delay might enable destruction of evidence, it is possible to obtain a search warrant from the Competition and Consumer Protection Court at any time during the investigation. The Polish Office of Competition and Consumer Protection may search premises, apartments, transport vehicles and so on at the request of the EU Commission when the Commission meets with resistance from any person requested to provide documents, information or other evidence while conducting an investigation pursuant to Community regulations; the Commission's

[97] See point E.6 of the Set.

representatives may also participate in an inspection when the Office is inspecting an undertaking on the request of the Commission.

4. Many jurisdictions impose penalties, including in some cases fines and imprisonment, for willful failures to comply with the Authority's investigative orders.

Leniency programmes[98]

5. Over the past decade, a large number of competition authorities have adopted so-called leniency programmes as an investigation tool to uncover the most serious form of anti-competitive practices, i.e. hard-core cartels. A leniency programme is a system, publicly announced, of, "partial or total exoneration from the penalties that would otherwise be applicable to a cartel member who reports its cartel membership to a competition [law] enforcement agency."[99] The cartel member must self-report and fulfil certain other requirements. Typically, cartel members must confess, cease cartel activity, and fully cooperate in providing significant evidence to aid in the proceedings against the other cartel members. For its part, the competition law enforcer transparently and credibly commits to a predictable pattern of penalties designed to give cartel members incentives to apply for leniency.

6. About 50 jurisdictions have self-identified as having a cartel leniency programme.[100] Among medium- and low-income countries, Brazil, Mexico, the Russian Federation and South Africa have active leniency programmes. Chile recently joined this group. Their programmes are similar to and work in parallel with those of the United States and the European Union, among others – the jurisdictions that probably receive the largest number of leniency applications. However, most medium- and low-income countries have no leniency programme.

7. Recent comparative research carried out by the UNCTAD secretariat has identified the conditions necessary for an effective leniency programme:

8. Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do not apply for leniency.

9. The penalties imposed on cartel members who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants.

10. The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated.

11. To attract international cartel members, the leniency programme protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.

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[98] For specific information on leniency programmes in developing countries, see the note by the UNCTAD secretariat on the effectiveness of leniency programmes as a tool for the enforcement of competition law against hard-core cartels in developing countries. TD/RBP/CONF.7/4.

[99] International Competition Network (2009). Drafting and implementing an effective leniency programme". Chapter 2 in *Anti-Cartel Enforcement Manual 2009*. Available at http://www.internationalcompetitionnetwork.org.

[100] ibid.

12. Finally, it is indispensable to mention that in the process of investigation, the general principles and rules of due process of law, which in many countries is a constitutional mandate, must be duly observed, including, where applicable, rules of legal privilege.

13. The following table provides examples of investigative regimes.

Alternative approaches in existing legislation – Investigative regimes

Country	**Powers of Authority**	**Sanctions for non-compliance**
European Union	The Commission may: – Require the provision of information – Enter premises and inspect them – Examine documents and records, and take copies – Seal premises or records for defined periods of time – Require any person to give an explanation of facts or documents	Non-compliance results in fines that may not exceed 1 per cent of the total turnover in the previous year of the infringing business.
United States	The authorities may require a person to: – Provide documents, information or other material – Give a sworn oral deposition The Department of Justice is also entitled to proceed with a criminal investigation, employing criminal investigative powers.	Failure to comply with a Civil Investigative Demand is a criminal offence punishable by fines and imprisonment.
Turkey	The Competition Board may request information it deems necessary from public institutions and organizations, undertakings and trade associations. Officials of these bodies are obliged to provide the necessary information within the period fixed by the Board. According to Article 15 of the Act on the Protection of Competition, the Competition Board is empowered to carry out unannounced on-site investigations. A judicial authorization is only required if the undertaking being investigated refuses to allow the dawn raid.	Failure to provide the requested information and the provision of wrong information can be sanctioned with a fixed pecuniary fine. Hindering an on-site investigation can be sanctioned by a fixed periodic monetary fine per day.
China	According to Article 39 of the Anti-Monopoly Law of the People's Republic of China, the Anti-Monopoly Authority is empowered to: – Enter the business premises of the enterprise under investigation or any other relevant place to investigate; – Request the subjects of an investigation to disclose relevant information; – Review and duplicate the relevant business documents etc.;	According to Article 52 of the Anti-Monopoly Law of the People's Republic of China, pecuniary penalties may be imposed for failure to submit required information, provision of false information, destruction or removal of

	– Seize and detain the relevant evidence; – Inquire about the bank accounts of the business operators who are under investigation.	evidence, and other forms of hindering/obstructing investigations.
New Zealand	The Commission may require the production of documents (subject to legal privilege) and the provision in writing of information, and may require persons to appear before it to give evidence and produce documents. The Commission may also obtain (from a court) and execute search warrants.	Failure to comply with the Commission's investigative powers is an offence, resulting in fines.

(b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;

14. The Administering Authority would need – as a result of inquiries and investigations undertaken – to take certain decisions, for example, initiating proceedings or calling for the discontinuation of certain practices, or denying or granting authorization of matters notified, or imposing sanctions, as the case may be.

15. The precise decision-making powers of the Authority will depend on the structure of the Authority and its relationship to the government and courts (see chapter IX), and specifically, on whether the Authority has a first instance decision-making capacity (as in the European Union), or whether it must act through the courts (as in the United States).

(c) Undertaking studies, publishing reports and providing information to the public;

16. The Authority could undertake studies and obtain expert assistance for its own studies, or commission studies from outside. In Brazil, for example, the law establishes that the Economic Law Office of the Ministry of Justice shall carry out studies and research with a view to improving antitrust policies. Some legislation explicitly requests the authorities to engage in particular studies. There are various reasons to undertake studies. For example, the Authority might choose to commission a study:

17. Of a sector, or a market for goods and services, to determine whether there are structural barriers to competition in that market;

18. Of a particular business practice or economic activity (e.g. bundling goods and services) to determine the economic and competitive consequences of that activity;

19. Of an aspect of the competition legislation, to assess whether the law is achieving its stated policy goals.

20. Many countries' authorities also publish reports or guidelines outlining the authorities' approaches to enforcement procedures or to the assessment of certain forms of economic

activity in competition law terms. For example, competition authorities frequently issue guidelines on the assessment of mergers. These guidelines may have the force of law (if the authority in question is afforded regulation-making powers) or they may simply indicate the Authority's approach to interpreting and applying the competition legislation.

21. Finally, an important role for the Authority, particularly in countries where competition law has recently been introduced, is to educate the public and the business community on the implications of competition law and the boundaries of lawful conduct (competition advocacy). To this end, the authorities in many countries issue annual reports, as well as public notices, pamphlets and educational papers.

(d) Issuing forms and maintaining a register, or registers, for notifications;

22. The laws of most countries having notification procedures include provision for some system of registration which must be characterized by transparency. This is the case, for example, of Spain, with the Registry for Safeguarding Competition. The European Commission publishes an overview of all notified concentrations on its webpage. Some countries maintain a public register in which some, but not all, of the information provided through notification is recorded. The usefulness of a public register lies in the belief that publicity can operate to some extent as a deterrent to enterprises engaging in restrictive business practices, and can provide an opportunity for persons affected by such practices to be informed of them. Such persons can also make specific complaints and advise of any inaccuracies in the information notified. However, not all the information notified can be registered, and one of the reasons for this is that some information will relate to so-called "business secrets", where disclosure could affect the operations of the enterprise in question. The need for appropriate handling of sensitive business information by competition authorities cannot be overstated, because a breach of such confidentiality will strongly discourage the business community from quick compliance with reasonable requests for information.

23. Issuing standard forms for the notification of mergers or restrictive trade practices can streamline the Authority's decision-making process and ensure that parties gather the information necessary to support a competition assessment before approaching the Authority.

(e) Making and issuing regulations;

24. The Authority should also have powers to issue implementing regulations to assist it in accomplishing its tasks. Due to the complexity of decision-making in some areas of competition law – for instance merger clearance and authorizations of restrictive trade practices – authorities commonly issue implementing regulations outlining procedures for notifying transactions or practices, gathering information, and assessment and decision-making.

(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;

25. Owing to the high level of specialization and the unique experience of the Administering Authority in the field of competition, a growing number of new laws or amendments give the Authority the additional responsibility of advising on the drafting of laws that may have anti-competitive effects, and also for studying and submitting to the government the appropriate proposals for amendment of the legislation on competition. This is the case, for example, of Bulgaria, at the level of the Commission for the Protection of Competition;[101] of Portugal, with its Council for Competition, which can formulate opinions, give advice and provide guidance in competition policy matters;[102] and of Spain, at the level of the Court for the Protection of Competition[103] and the Competition Protection Service.

(g) Promoting exchange of information with other States.

26. The United Nations Set of Principles and Rules on Competition requires States to establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices. It would be convenient to provide the Authority with the power to promote such exchange by clearly establishing this as one of its functions.

27. Information exchange serves the multiple purposes of allowing the sharing of expertise, encouraging convergence in competition law standards around the world, and supporting the exchange of evidence. The latter is increasingly important, due to the international character of many cartels. An ability to exchange or share evidence helps ensure efficient enforcement against cartels.

Alternative approaches in existing legislation – Information-sharing

Belgium	Under the legislation of Belgium, it is possible to communicate the necessary documents and information to the appropriate foreign authorities for competition matters, under agreements regarding reciprocity in relation to mutual assistance concerning competitive practices.[104]
Germany	Under the seventh amendment, of 12 July 2005, to Germany's Act Against Restraints on Competition, the Bundeskartellamt's authority to cooperate with other competition authorities (especially within the European Competition Network) has been strengthened, for example in respect of information exchange and mutual assistance with investigations.

[101] Statute of 15 November 1991 on the Organization and Activities of the Commission for the Protection of Competition. Article 4 (3).

[102] Decree Law No. 371/93 of 29 October 1993 on Protection and Promotion of Competition. Article 13 (1) (b), (c) and (d).

[103] Law 16/1989 of 17 July for the Protection of Competition. Article 26. Additional information on this matter can be found at: Tribunal de Defensa de la Competencia. Memoria 1992: 66.

[104] Law on the Safeguarding of Economic Competition. Article 50 (b).

Australia	In 2007, the Parliament of Australia passed legislation which enables the Australian Competition and Consumer Commission (ACCC) to share certain information obtained during the course of its investigations with foreign and domestic government bodies. Previously, the ACCC could only disclose information obtained through its compulsory information-gathering powers when performing its own duties or functions, or if otherwise required by law. The new provisions allow the ACCC to disclose this and other information (known as “protected information”) to specified agencies, bodies and persons if the Chair of the ACCC is satisfied that the information will enable or assist that body to perform its powers or functions. Significantly, section 155AAA of the Trade Practices Act 1974 allows the ACCC to disclose protected information to “a foreign government body”. This power will assist the ACCC in coordinating investigations with international enforcement counterparts. Information will be considered “protected” where it is, inter alia: (a) given to the ACCC in confidence and relates to a matter arising under a core statutory provision; (b) obtained under section 155 of the Trade Practices Act or obtained under the search and seizure powers of the ACCC and relates to a matter arising under a core statutory provision; (c) obtained by the ACCC under the various information-gathering powers concerning the telecommunications industry and the telecommunications access regime and relates to a matter arising under Part XIB or XIC of the Trade Practices Act; or (d) given in confidence to the ACCC by a foreign government body and the information relates to a matter arising under a provision of a law of a foreign country (or part of a foreign country). The new provisions align with the philosophy expressed in section E, paragraph 7 of the United Nations Set of Principles and Rules on Competition and are consistent with the OECD Guidelines for protecting consumers from fraudulent and deceptive commercial practices. Section 155AAA is consistent with, and builds upon, clause (g) of Chapter X of the Model Law. Importantly, the section provides a legislative basis for the ACCC to share information with its international counterparts in appropriate circumstances, including under Australia’s bilateral agreements.
Algeria	The Algerian regulation establishes a framework for cooperation between the Competition Board and foreign competition authorities, with a view to ensuring adequate implementation of national and foreign competition laws and developing collaboration and information exchange between the authorities concerned, subject to the rules relating to national sovereignty, public policy (“ordre public”) and professional secrecy. This framework is

	in conformity with the provisions for cooperation contained in article 41 and annex 5 of the association agreement with the EU.[105]
New Zealand / Australia / Canada	The New Zealand Commerce Commission, the Australian Competition and Consumer Commission and the Canadian Commissioner of Competition share information and cooperate on enforcement efforts, pursuant to a memorandum of understanding.

28. Information exchange and consultations are also provided for in bilateral agreements between the United States, Australia, Brazil, Canada, Germany, Israel, Japan, Mexico and the European Commission, as well as between France and Germany. There is also a multilateral agreement between Denmark, Iceland and Norway.

II. Confidentiality

1. According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.

3. Protecting the deliberations of government in regard to current or still uncompleted matters.

29. In accordance with paragraph 5 of section E of the United Nations Set of Principles and Rules on Competition, legitimate business secrets should be accorded the normally applicable safeguards, in particular to protect their confidentiality. The confidential information submitted to the Administering Authority or obtained by it can also be protected, in general, by the national legislation regarding secrecy. Nevertheless, in some countries, the competition legislation contains special provisions on the secrecy of the evidence obtained during the proceedings.

Alternative approaches in existing legislation – Protection of confidential information

Australia	At the time of introducing criminal sanctions for cartel conduct in 2009, the Parliament of Australia also introduced amendments to the Trade Practices Act to enhance the protection of cartel information provided to the ACCC (known as “protected cartel information”). The Parliament recognized that whistleblowers/informants would be more willing to provide information about cartel conduct to the ACCC if the protection afforded to that material was enhanced. Protected cartel information is defined as information provided in confidence to the ACCC where it relates to a breach or potential breach of the criminal cartel offence or civil cartel prohibition.[106]

[105] Euro-Mediterranean Agreement establishing an association between the European Communities and their member States on the one hand and Algeria on the other (22 April 2002).

[106] See sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the Trade Practices Act. Available at http://www.comlaw.gov.au/.

	Broadly, the ACCC is not required to disclose protected cartel information, however it may do so after weighing certain public interest considerations set out below: (a) the fact that the protected cartel information was given to the ACCC in confidence; (b) Australia's relations with other countries; (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation; (d) in a case where the protected cartel information was given by an informant: (i) the protection or safety of the informant or of persons associated with the informant; and (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future; and (e) the interests of the administration of justice.[107] However, a court or tribunal may require the ACCC to disclose protected cartel information to it after weighing the public interest factors set out above. The regime applying to protected cartel information also restricts use of the information in secondary proceedings. The provisions in respect of protected cartel information build on the clauses contained in Chapter X, Article II of the Model Law.
China	Article 41 of the Anti-Monopoly Law of the People's Republic of China stipulates that the Anti-Monopoly Law Enforcement Agency and its staff members shall have the responsibility to keep business secrets, which they obtain when enforcing the law, confidential. Article 38(2) states that any entities or individuals may tip off any suspicious monopolistic conduct to the Anti-Monopoly Law Enforcement Agency. The Anti-Monopoly Law Enforcement Agency shall keep the informer confidential.
Malaysia	Article 21 of the Competition Act 2010 provides for the protection of confidential information. It reads as follows: (1) Any person who discloses or makes use of any confidential information with respect to a particular enterprise or the affairs of an individual obtained by virtue of any provision of this Act commits an offence. (2) Nothing in subsection (1) shall operate to prevent the disclosure of information where – (a) the disclosure is made with the consent of the person from whom the information was obtained; (b) the disclosure is necessary for the performance of the functions or

[107] See subsection 157C(5) of the Trade Practices Act. Available at http://www.comlaw.gov.au/.

	powers of the Commission; (c) the disclosure is reasonably made during any proceedings under this Act provided that such disclosure is not made against any direction by the Commission or the Competition Appeal Tribunal before which the proceedings are taking place; (d) the disclosure is made in connection with an investigation or an infringement or an offence under this Act; or (e) the disclosure is made with the authorization of the Commission to any competition authority of another country in connection with a request by that country's competition authority for assistance. (3) For the purposes of this section, "confidential information" means trade, business or industrial information that belongs to any person, that has economic value, and that is not generally available to or known by others.

Model Law on Competition (2010) – Chapter XI

Sanctions and relief

I. *The imposition of sanctions, as appropriate, for:*

(i) *Violations of the law;*

(ii) *Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;*

(iii) *Failure to supply information or documents required within the time limits specified;*

(iv) *Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense.*

II. *Sanctions could include:*

(i) *Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);*

(ii) *Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);*

(iii) *Interim orders or injunctions;*

(iv) *Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;*

(v) *Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);*

(vi) *Restitution to injured consumers;*

(vii) *Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.*

COMMENTARIES ON CHAPTER XI AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS

Introduction[108]

1. Chapter XI of the Model Law on Competition deals with tools for competition law enforcement: “Sanctions and relief”. The latter is more commonly referred to as remedies. Given the objective and the compulsory nature of competition laws, as well as commercial motivations for contravening them, sanctions and remedies are of particular importance. Safeguarding competition – the primary objective of most competition laws – requires companies to comply with compulsory provisions of a procedural or substantive nature. However, experience has shown that undertakings will only comply with compulsory rules if there is a high likelihood that non-compliance will be detected, and, once it is detected, there is a high likelihood that sanctions will be imposed, and that the direct and indirect cost of those sanctions will be commercially significant. In this sense, the threat of significant sanctions appears crucial for encouraging compliance with competition law. With respect to the primary objective of most competition laws, i.e. protecting the competitive process, remedies complement sanctions, since they aim at safeguarding or restoring competition in cases where companies have distorted or are about to distort competition.

2. While the wording of Chapter XI (II) could be understood to refer to sanctions only, it appears from the examples listed that this provision also covers remedies. For instance, the injunctions referred to in Chapter XI (II) (iii) and the orders to remedy a violation by positive conduct referred to in Chapter XI (II) are usually qualified as remedies. In addition, most competition laws provide for both of the two enforcement tools, which complement each other.

3. Sanctions and remedies are tools for public competition law enforcement, that is to say, for enforcement by public authorities, such as competition agencies and courts. Recently, well-established competition law regimes have started to promote private enforcement through private actions by the victims of competition law violations, as a complement to public enforcement. This aspect of competition law enforcement does not fall under Chapter XI, but will be dealt with in the commentaries on Chapter XIII of the Model Law on Competition.

Sanctions

Enforcement body vested with the power to impose sanctions

4. The power to impose sanctions may be vested either in the administering authority, or in the judicial authority, or it may be divided between the two. In the latter case, for example, the administrative authority’s power to impose a sanction might be limited to such conduct as refusals to supply information, the giving of false information, or failure to modify agreements.

5. In Pakistan, Panama, Peru, the Russian Federation and Switzerland, and in the European Union, the administering bodies have powers to impose fines. In Australia and the United States, the power to impose fines or other sanctions is vested in the courts.

Different types of sanctions

6. Sanctions may be imposed in case of violations of a substantive provision of the competition law, and in case of procedural violations, as mentioned in subparagraphs (iii) and (iv) of Chapter XI (I) of the Model Law on Competition. For instance, Austrian competition law provides for procedural sanctions in case of false/misleading information in a merger

[108] See also the note by the UNCTAD secretariat entitled “Appropriate sanctions and remedies”. TD/RBP/CONF.7/5. August 2010.

notification and in case of false/misleading information or incomplete provision of information or non-compliance with a Cartel Court's order to provide information. Under Hungarian competition law, a procedural fine may be imposed on the party or other persons involved in the proceedings of a competition case, and furthermore on persons obliged to provide assistance in clarifying the facts of the case if they engage in an act or display behaviour which is aimed at protracting the proceedings or preventing the disclosure of facts, or which has such an effect.

7. Sanctions for contravention of substantive provisions may be of an administrative, civil or criminal nature. Administrative sanctions – in particular, fines – are the most common form of sanctions in cartel cases. Some legal systems provide for the possibility of imposing fines on individual competition law infringers in addition to those imposed on the undertaking on whose behalf they acted. This is, for example, the case in Germany, where the competition law liability of an undertaking derives from the establishment of a competition law infringement by its management or employees. Other competition legislation only provides for the possibility of fining the companies in question. Besides fines, administrative sanctions may also include prohibiting individuals from serving as officers of public corporations, or blacklisting companies involved in bid-rigging from future government tenders.

8. As opposed to administrative sanctions that can be imposed by a competition authority, civil or criminal sanctions may only be decided upon by a court. Whereas fines may have an administrative, civil or criminal nature, imprisonment is exclusively criminal in nature. Some countries that opted for a system of administrative sanctions provide for criminal sanctions in specific competition cases, e.g. in the case of bid-rigging in government tenders organized by public authorities.

Alternative approaches in existing legislation - Types of sanctions

<table>
<tr><th rowspan="3">Country / Jurisdiction</th><th colspan="7">Sanctions</th></tr>
<tr><th colspan="2">Civil</th><th colspan="2">Administrative</th><th colspan="3">Criminal</th></tr>
<tr><th>Fines</th><th>Other</th><th>Fines</th><th>Other</th><th>Fines</th><th>Imprison-ment</th><th>Other</th></tr>
<tr><td>Australia</td><td>X</td><td>X</td><td></td><td></td><td>X</td><td>X</td><td></td></tr>
<tr><td>Republic of Korea</td><td></td><td></td><td>X</td><td>X</td><td>X</td><td>X</td><td></td></tr>
<tr><td>Japan</td><td></td><td></td><td>X</td><td>X</td><td>X</td><td>X</td><td></td></tr>
<tr><td>Indonesia</td><td></td><td></td><td>X</td><td>X</td><td colspan="3">Law 5/1999 provides for several types of criminal sanctions, which are, however, not applied in practice.</td></tr>
<tr><td>Armenia</td><td></td><td></td><td>X</td><td>X</td><td colspan="2">Limited to severely anti-competitive behaviour</td><td></td></tr>
<tr><td>Russian Federation</td><td></td><td></td><td>X</td><td>X</td><td></td><td></td><td></td></tr>
<tr><td>Turkey</td><td></td><td></td><td>X</td><td>X</td><td></td><td></td><td></td></tr>
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Country / Jurisdiction	Sanctions						
	Civil		Administrative		Criminal		
	Fines	Other	Fines	Other	Fines	Imprison-ment	Other
South Africa			X	X	X	X	
Kenya				X	X	X	
Zambia					X	X	
Egypt			X	X	X		X
Tunisia			X	X	X	X	X
European Union			Limited to undertakings/no personal liability				
France			X	X	X	X	
United Kingdom			X	X	X	X	X
Germany			X	X	Limited to bid-rigging		
Peru			X	X			
Brazil			X	X	X	X	
Costa Rica			X	X			
Mexico			X	X	Limited to severely anti-competitive behaviour		
United States	X	X		X	X	X	
Canada			X	X	Limited to price-fixing, market allocation and output restriction		

9. Subsection II of Chapter XI of the Model Law on Competition lists different types of possible sanctions. Although it covers the most common types of sanctions, the list should not be considered as exhaustive.

(i) *Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity)*

10. As mentioned previously, fines may be administrative, civil or criminal in nature. For various reasons, including relatively low administration costs, they form a central element of every public enforcement system. In many jurisdictions, the competition law itself grants the power to the administering or judicial authority to impose fines, and sets the maximum amount of fines by statutory limit. The maximum amount of fines should be set at a sufficiently high level to achieve a significant deterrent effect. It can be expressed as a percentage of the turnover of the competition law violator, in terms of a specific figure, or in reference to a variable unit, such as a country's minimum salary.

Alternative approaches in existing legislation – Maximum amount of fines

Country	
Maximum amount of fines expressed as a percentage of the competition law violator's turnover	
European Union	Pursuant to Article 23, paragraph 2 of Regulation 1/2003, the Commission may impose a maximum administrative fine against the infringing undertaking of 10 per cent of the undertaking's worldwide annual turnover.
Australia	Under Australian competition law, the criminal cartel offence is punishable by imprisonment of up to 10 years and/or fines of up to A$220,000 per contravention. Under the civil cartel prohibition, individuals may be liable to a pecuniary penalty of up to A$500,000 per contravention. For corporations, each contravention of the criminal cartel or civil cartel prohibition will result in a fine or pecuniary penalty (whichever applies) not exceeding: (a) A$10,000,000; or (b) three times the total value of the benefit obtained from the commission of the offence, or the act or omission in contravention of the civil prohibition; or (c) where those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in a 12-month period preceding the offence/contravention.
China	Concerning fines, Articles 46 to 48 of Anti-Monopoly Law provide that where the business operators reach and fulfil a monopoly agreement or abuse their dominant market position in violation of this Law, the Anti-Monopoly Law Enforcement Agency shall impose fines. The amount of the fines is between 1 per cent and 10 per cent of the sales revenue made in the previous year. Where the business operators implement the concentration in violation of this Law, the Anti-Monopoly Law Enforcement Agency may impose a fine of up to ¥500,000. The Anti-Monopoly Law Enforcement Agency shall consider such factors as the nature, extent and duration of the violations when determining the amounts of fines.

Country	
Croatia	According to the new Croatian Competition Act that was adopted in June 2009 and will enter into force on 1 October 2010, fines of up to 10 per cent of the aggregate turnover of the undertaking can be imposed for the most serious breaches of the competition rules, and fines of up to 1 per cent can be imposed for other violations of the competition rules. The new power to impose fines will also include the possibility to increase the fine in order to exceed the amount of gains improperly obtained as a result of the infringement.
Hungary	According to Hungarian competition law, the maximum fine for substantial competition law violations may not exceed 10 per cent of the net turnover – achieved in the business year preceding that in which the decision establishing the violation is reached – of the undertaking, or, where the undertaking is a member of a group of undertakings that is identified in the decision, of that group of undertakings.
Japan	According to the Japanese Anti-Monopoly Act, surcharges are calculated based on the sales value of the products or services affected during the period of violations (three years at a maximum), by multiplying the respective sales value by percentage factors as determined according to type of violation, scale of operations and business categories. For manufacturing companies, the percentage factors range between 1 and 10 per cent; for wholesalers between 1 and 2 per cent; and for retailers between 1 and 3 per cent.
Ethiopia	In Ethiopia, the maximum fine for competition law violations amounts to 10 per cent of the value of the total assets of the company infringing the law or to 15 per cent of its annual sales.
Maximum amount of fines expressed as a fixed sum	
Benin	According to Law N° 90-005 of 15 May 1990 stipulating the conditions for commercial activities in Benin, fines between FCFA 500,000 and FCFA 10 million can be imposed for violation of the law. Note that the fines provided for by the Benin's draft competition legislation under discussion in 2010 are significantly higher.
Canada	According to Canadian competition law, administrative monetary penalties may not exceed $10 million (or $15 million in the case of a subsequent order). Criminal offences, such as cartel agreements, are punishable by terms of imprisonment of up to 14 years and/or fines of up to $25 million.
Chile	In Chile, fines may be of up to approximately $400,000, the amount being determined by the Tribunal duly taking into consideration the offender's turnover and economic capacity and the gravity of the infraction.

Country	
United States	In the United States, legislation was enacted in 2004 raising the maximum corporate fine for an antitrust violation from $10 million to $100 million.
Zambia	Under Zambian legislation, penalties include a fine not exceeding 10 million kwacha.
Maximum amount of fines expressed by reference to a variable unit	
Brazil	According to Article 23 of Law 8.884 of 3 June 1994, the following antitrust penalties shall apply: – (i) for companies: a fine from 1 to 30 per cent of the gross pre-tax revenue during the latest financial year. The fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable; – (ii) for managers directly or indirectly liable for their company's violation: a fine from 10 to 50 per cent of the fine imposed on the said company, which shall be personally and exclusively imposed on the manager; and – (iii) in the case of other individuals and other public or private legal entities, as well as any de facto or de jure associations of entities or persons, even temporary ones, with or without legal identity, that do not engage in business activities, when it is not feasible to use the gross sales value, the fine will be from 6,000 (six thousand) to 6,000,000 (six million) UFIR* or any other index replacing it. Fines imposed for recurring violations shall be doubled. * Fiscal reference unit.
Peru	Peruvian competition law distinguishes different degrees of competition law infringement. For the most serious infringements, it provides for a fine ranging between 1,000 times the *Unidades Impositivas Tributarias* (which is a reference unit based on the consumer price index) and 12 per cent of the annual turnover of the group of companies to which the competition law violator belongs.

11. In several jurisdictions, the administering authority has published guidelines identifying the elements that will be taken into account when calculating the amount of the fine. Aggravating factors, such as a continuation or repetition of the infringement or an important role in its realization may lead to an increase in the fine. In this context, a high amount of illicit profit may constitute an aggravating factor. By contrast, mitigating circumstances result in a reduction of the fine. Most importantly, in several countries, cooperation by a competition law violator within the framework of a leniency programme justifies a reduction of the fine. For instance, in Hungary, the Competition Council grants immunity from – or reduces – the fine imposed on undertakings that disclose to the Hungarian Competition Authority, in a manner specified by the Act, agreements or concerted practices between competitors which are aimed directly or indirectly at fixing purchase or selling prices; at

sharing markets, including bid-rigging; or at the allocation of production or sales quotas.[109] On 1 April 2010, a new amendment came into force in Hungary which institutionalized the so-called informant reward scheme. Based on the amendment, those persons who provide indispensable information about hardcore cartels may be entitled to obtain a reward under conditions specified by law (the reward must not exceed 1 per cent of the fine). In addition, competition authorities may reward a company's willingness to agree on settlement of a cartel case with a reduction in the fine, since such settlements help to shorten the prosecution period and to save resources. Further mitigating factors may include the immediate termination of an infringement subsequent to the intervention of the competition authority, and negligent violation of competition law as opposed to intentional wrongdoing. In exceptional cases, a competition authority may also take into account an undertaking's inability to pay in a specific social and economic context, and may therefore reduce the fine or allow for moderated payment modalities. Fining a company to the level of bankruptcy and thereby causing a market exit would be against competition laws' primary objective of protecting the competitive process.

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person)

12. Recent enforcement attitudes in well-established competition law regimes towards anti-competitive agreements have been to seek deterrence by means of very substantial fines for companies. For instance, in 2008 the European Commission fined Saint-Gobain, of France, €896 million for its involvement in a market-sharing cartel with other glass manufacturers. In 2009, the chip manufacturer Intel was found to have infringed article 102 of the EU Treaty, and consequently, a fine of over €1 billion was imposed. In addition, a trend towards higher fines can also be observed in some younger competition law regimes.

13. Although most competition legislation provides for administrative or civil sanctions in the case of anti-competitive behaviour, there is a trend towards criminalization. Until recently, only the United States imposed criminal sanctions involving imprisonment on individuals in cases of competition law violation. The Sherman Act provides for criminal penalties (for violations of Sections 1 and 2), and an infraction may be prosecuted as a felony punishable by a corporate fine and up to 10 years' imprisonment for individuals. A number of other countries had provisions in place without applying them. Today, more countries – including Canada, Israel, Japan and the United Kingdom – impose criminal sanctions on individuals to fight hardcore cartels. The United Kingdom has introduced – under the Enterprise Act 2003 – criminal sanctions for individuals who commit certain clearly defined anti-competitive offences. In 2008, jail terms were imposed for the first time by courts of the United Kingdom on individuals who had participated in an international cartel. In 2009, the Parliament of Australia passed legislation to criminalize specific cartel conduct (price-fixing; restricting outputs in the production or supply chain; allocating customers, suppliers or territories; and bid-rigging).[110]

14. Proponents of criminal sanctions for individuals argue that these are the most effective motivation for compliance by corporate managers and therefore corporations. Since the current level of fines imposed on companies in jurisdictions such as the United States and the

[109] Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, Articles 78/A-78/B, and 88/D.

[110] Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, available at http://www.comlaw.gov.au/.

European Union could not be raised further without causing economic damage, and since fines would ultimately be passed on to consumers, greater deterrence by other means would be needed. Therefore, personal liability on the part of wrongdoers would have to play a more important role. In this context, it is also argued that pecuniary sanctions imposed on individuals would not result in the desired deterrence, since there is a high risk that companies would assume the respective fines on behalf of their employees. This risk may be mitigated by a respective prohibition addressed to the company.

15. However, for a number of reasons, a State may opt against criminal sanctions for competition law violations. Firstly, it may not be appropriate to provide for criminal sanctions when competition law is new and the business community has not had a reasonable period to familiarize itself with the new legal obligations. Furthermore, until competition law principles are widely accepted as an important part of the legal and economic environment, the criminalization of violations may not be in line with social and legal norms. In addition, the costs of criminal sanctions – in particular, imprisonment – may appear too high in comparison with the costs of other forms of sanctions. Another concern put forward against criminal sanctions in competition cases relates to increased procedural requirements – for example, a higher standard of proof to be respected in criminal cases. These factors may make the prosecution of competition law violations more difficult and costly, and decrease the number of successful cases. In summary, each of these arguments may have some validity.

16. The power to impose imprisonment would normally be vested in the judicial authority. In certain countries, such as Japan and Norway, the power to impose terms of imprisonment is reserved for the judicial authorities on the application of the Administering Authority.

Remedies

17. In contrast to sanctions, remedies that aim at maintaining or restoring competition in the future are not punitive in nature. Remedies serve to put a competition law infringement to an end, compensate victims, and cure the competitive harm. Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing or time-limited remedies that are designed to modify or constrain the behaviour of firms (in some jurisdictions, behavioral remedies are referred to as “conduct remedies”). Where these remedies require any ongoing supervision or monitoring, the cost for both the authority and the undertakings can be high. Some remedies, such as those relating to access to intellectual property rights, are particularly difficult to categorize on this basis.

18. Depending on the legal framework, competition authorities may impose remedies unilaterally, or they may negotiate them with the parties concerned upon a proposal made by the parties (so-called undertakings or commitments). It is true that undertakings or commitments are sometimes considered as sanctions. However, taking into account that they primarily seek to reinstate competition where it has been distorted by an anti-competitive practice, undertakings or commitments may very well be classified as remedies.

19. In addition to fines and imprisonment, subsection II of Chapter XI of the Model Law on Competition lists a number of measures that actually qualify as remedies, according to the understanding of most competition laws today.

(iii) Interim orders or injunctions;

20. Interim orders or injunctions generally fall within the category of behavioural remedies. They may be granted as a preliminary measure during a pending competition case in order to prevent a company from violating or continuing to violate the competition law. In different competition law regimes, different enforcement bodies are vested with the power to impose interim orders or injunctions. In common law countries, it is mainly the courts who exercise this power. For instance, in Canada, the Director of Public Prosecutions may – in urgent situations – apply for an interim injunction to the competent court to temporarily halt behaviour that constitutes, or is directed toward, the commission of an offence. In civil law countries, competition authorities may have such powers. For example, the German Federal Cartel office may pronounce interim measures according to Section 32a of the Act against Restraints of Competition. In Hungary, the Competition Council may – as an interim measure – prohibit, in its injunction, the continuation of the illegal conduct, or order the elimination of the unlawful situation, if prompt action is required for the protection of the legal or economic interests of the interested persons or because the formation, development or continuation of economic competition is threatened. The Competition Council may also require a bond as a condition, if the interim measure was required by the party under investigation.[111]

(iv)	*Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;*

21. In effect, cease and desist orders are similar to injunctions, and serve as a means to bring a competition law infringement immediately to an end. For instance, a competition authority may order cartelists to stop price-fixing agreements, or it may order a dominant undertaking to stop anti-competitive bundling of certain products. Most competition legislation provides for cease and desist orders.

22. In certain situations, however, the conduct under scrutiny has already caused anti-competitive harm, so it may be necessary to order specific measures in order to restore competition. In this context, Chapter XI (II) (iv) of the Model Law on Competition refers to orders to "remedy a violation by positive conduct, public disclosure or apology, etc." The imposition of a behavioural remedy compels the undertaking to act in a particular way. This includes, for example, amendments to price structures, rebate systems, changes to trading conditions, and granting access to infrastructure or intellectual property etc.

23. Although behavioural remedies may be formulated to address a specific competitive concern, they are often considered to be inconvenient from the perspective of monitoring, given that they require ongoing monitoring, which affects a competition authority's resources.

(v)	*Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);*

24. Divestiture in merger cases is the most frequent structural remedy. Under a pre-merger notification system, competition authorities typically assess the likely effects of a notified transaction on competition. When this prognosis reveals competitive concerns, these may be addressed through appropriate remedies, such as divestiture of specific parts of an undertaking, for example a production site or a distribution network. Competition legislation varies on the question of whether divestitures must be proposed by the notifying parties and then tested by the competition authority, or whether the authority is granted the power to

[111] Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Articles 72 (1) (c) and 72 (2).

unilaterally impose a divestiture in its clearance decision. Taking into account the fact that the parties to a proposed merger are primarily responsible for shaping the transaction, it might be advisable that the competition authorities rely upon the parties to design an appropriate remedy in dialogue with the competition authority.

25. In Japan, for instance, in many cases, the parties voluntarily hold prior consultations with the Japanese Fair Trade Commission (JFTC) in advance of formal notifications. The JFTC carries out inspections at an early stage, and if it concludes that the transaction is problematic, the JFTC indicates its competition concerns to the parties. Then, the parties propose a remedial measure on a voluntary basis, the effectiveness of which is assessed by the JFTC. Thanks to this procedure, the JFTC seldom imposes remedies in merger and acquisition cases as a formal action.

26. Under post-merger notification systems, a competition authority only intervenes once the transaction in question has already been completed. Thus, any remedy to competitive concerns can only be designed and decided upon after implementation of the merger, which may pose certain inconveniences from a practical perspective. In a situation where a divestiture may not remedy the competitive harm caused by a merger, the competition authority may have to order the rescission or dissolution of that merger, which involves the difficulty of “unscrambling the eggs”.

27. In merger cases, rescission constitutes an *ultima ratio*, when competition cannot be safeguarded by any other means. Typically, it may be applied if the parties to an anti-competitive merger have not respected a statutory waiting period in a pre-merger notification system and have implemented the proposed transaction without the required approval by the competent authority. As mentioned earlier, rescission may also occur under post-merger notification systems.

Alternative approaches in existing legislation – Structural remedies in merger cases

Country	
Canada	Where the Canadian Competition Bureau believes that a merger is likely to prevent or lessen competition substantially, the Commissioner may either apply to the Competition Tribunal to challenge the merger under the applicable provisions of the Act, or negotiate remedies with the merging parties in order to resolve competition concerns on consent. Where the Tribunal finds that a merger prevents or lessens or is likely to prevent or lessen competition substantially, it may issue an order prohibiting the merger, or a remedial order requiring the parties to dissolve the merger or make divestitures. Parties to a proposed transaction that exceeds certain monetary thresholds must notify the Commissioner and wait for a statutory review period to expire before the transaction may close. Parties that fail to respect the waiting period rules may face an order requiring them to dissolve the merger, make divestitures, or pay an administrative monetary penalty of up to Can$10,000 for each day of non-compliance.
European Union	In the case of mergers, the Merger Regulation expressly provides that the Commission may decide to declare a concentration compatible with the EU market following modification by the parties, both before and after the initiation of proceedings. To that end, the Commission may attach to its decision conditions and

Country	
	obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. However, the Commission is not in a position to unilaterally impose any conditions on an authorization decision; it can only accept such conditions when they are proposed by the parties. Where a concentration raises competition concerns in that it could significantly impede effective competition, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance for their merger. The Commission has to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified. According to the case law of the European courts, the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments that are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the objectives of the Merger Regulation, inasmuch as such commitments eliminate the competition concerns which would be raised by the merger as notified. Moreover, they do not require medium- or long-term monitoring measures.
Mauritius	Proposed mergers notified to the Competition Commission of Mauritius (CCM) and investigated can be blocked if they are expected to result in a significant lessening of competition, and if there is no more effective remedy. If a significant lessening of competition is expected only in some markets, then the CCM might block only part of the deal, allowing the merger to be completed subject to certain parts of the target enterprise remaining independent. Alternatively, the merger could be allowed to be completed in full, but the merged enterprise would then be required to sell off part of the enterprise (within a specified period). In both cases, the CCM will apply the same principles to determining the package of assets that must be removed from the merged enterprise as set out below. The divestment of assets can represent a highly effective means to create a more competitive market structure than would otherwise have existed. However, the CCM recognizes that forced divestment represents a considerable intervention in property rights. It therefore will not require divestment in such cases unless it is satisfied that no other equally effective remedy exists, and that such intervention is not disproportionate to the expected benefits. The package of assets must be viable, whether in independent ownership or under the control of an existing player in the market. Viability requires that the divested business be able to offer an effective competitive threat to other producers in the market, while remaining profitable.

Country	
	The CCM will allow enterprises as much freedom as possible in choosing the manner of divesting their assets, as long as the effectiveness of the remedy is preserved and the divestment proceeds in a timely fashion. The CCM may also place restrictions on the types or the specific identities of allowed buyers of the divested assets. Before proceeding to due diligence, enterprises divesting assets must obtain the CCM's approval of the preferred buyer. The CCM is likely to reject potential buyers if it believes that they will not use the assets to compete effectively in the relevant markets in which it has identified concerns. Divestment remedies normally require no monitoring or enforcement by the CCM, once the sale of assets is complete. However, as part of the divestiture order (or accepted undertakings), the CCM will normally specify that the divested assets cannot be repurchased by the divesting enterprise (or otherwise come back under its control). This prohibition will be limited by a sunset clause, typically of 10 years.
United States	In the United States, divestiture constitutes a remedy in cases of unlawful mergers and acquisitions. It is considered as a "structural remedy", requiring some dismantling or sale of the corporate structure or property which contributed to the continuing restraint of trade, monopolization or acquisition. Structural relief can be subdivided into three categories, known as the "three Ds": dissolution, divestiture and divorcement. "Dissolution" is generally used to refer to a situation where the dissolving of an allegedly illegal combination or association is involved; it may include the use of divestiture and divorcement as methods of achieving that end. "Divestiture" refers to situations where the defendants are required to divest themselves of property, securities or other assets. "Divorcement" is a term commonly used to indicate the effect of a decision where certain types of divestiture are ordered; it is especially applicable to cases where the purpose of the proceeding is to secure relief against antitrust abuses flowing from integrated ownership or control (such as vertical integration of manufacturing and distribution functions or integration of production and sale of diversified products unrelated in use or function). This type of remedy is not created in express terms of statute. But Section 4 of the Sherman Act and Section 5 of the Clayton Act empower the Attorney-General to institute proceedings in equity to "prevent and restrain violations of the antitrust laws", and provide that "Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined otherwise prohibited". Furthermore, aside from these general statutory authorizations, the essence of equity jurisdiction is the power of the court to mould the decree to the necessities of the particular case. Thus, invocation by the Government of the general authority of a court of equity under the

Country	
	Sherman Act or the Clayton Act enables the court to exercise wide discretion in framing its decree so as to give effective and adequate relief. See: Chesterfield, Oppenheim, Weston and McCarthy (1981). *Federal Antitrust Laws*. West Publishing Company: 1042. See also: Bureau of Competition of the Federal Trade Commission (1999). *A Study of the Commission's Divesture Process.*

(vi) Restitution to injured consumers;

28. Some competition legislation allows the competent authority to order restitution to those who suffered harm resulting from the anti-competitive conduct. For instance, in Indonesia, administrative measures provided for by Article 47 of Law 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition include the stipulation of a compensation payment by the Indonesian competition authority. Such a restitution order, as part of public enforcement, is different from damages, which may be accorded by a civil court as part of private competition law enforcement. The latter is referred to in Chapter XIII of the Model Law on Competition (Action for damages).

(vii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

29. As has already been mentioned, well-established competition law systems have begun promoting private enforcement of competition law – that is to say, private actions for damages by those who have suffered harm resulting from anti-competitive conduct, in particular by hardcore cartels. These private actions are generally commenced in civil courts, and predominantly take the form of follow-on actions, i.e. actions that follow the public prosecution in a cartel case.

30. For the purposes of procedural efficiency, competition legislation may stipulate that the findings of the competition authority or court that established anti-competitive behaviour should be binding for follow-on claims for damages. This means that claimants for damages will not need to prove the anti-competitive behaviour by the defendant; claimants will only need to substantiate and prove the damage that they have suffered from the infringement of the competition law. For instance, according to Germany's Act Against Restraints of Competition, where damages are claimed for a competition law violation, the court shall be bound by a finding of such a violation in a final decision of any national cartel authority of a member State of the European Union or of the European Commission. In some countries, private action for damages is only allowed subsequent to a competition authority's decision, for example in Costa Rica, Japan and South Africa.

Model Law on Competition (2010) – Chapter XII

COMMENTARIES ON CHAPTER XII AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Appeals

1. Request for review by the Administering Authority of its decisions in the light of changed circumstances.

2. Affording the possibility for any enterprise or individual to appeal within (...) days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.

Introduction[112]

1. Chapter XII of the Model Law on Competition covers administrative and judicial review of competition decisions. Whereas subsection 1 of the Chapter refers to a review carried out by the competition authority itself, subsection 2 refers to judicial review by a body that is separate from the competition authority.

Internal/administrative review

2. The Model Law on Competition suggests that addressees of a competition decision may request a review of the respective decision in light of changed circumstances. In practice, however, it is more frequent that an assessment of a changed situation is triggered by a new application by the addressees of the original competition decision. For instance, in a case where a competition authority has prohibited a merger, the parties are free to restructure the transaction in a way that eliminates competitive concerns and to notify the redesigned transaction for approval. In competition law systems, where the competition authority is vested with the power to authorize possibly anti-competitive agreements based on efficiency considerations, the addressees of a prohibition decision may reapply for an authorization if they feel that the reasons for the prohibition no longer apply. Similarly, they must reapply for approval if the original approval was granted for a limited period.

3. Under Dutch competition law, an internal review of a contested decision by the Dutch competition authority (NMa) may precede judicial review. Since the entry into force of the Dutch Competition Act on 1 January 1998, NMa decisions applying European and national competition law have been subject to a three-stage appeals process.

[112] See also the note by the UNCTAD secretariat on appropriate sanctions and remedies and judicial review. TD/RBP/CONF.7/5. August 2010.

4. First, it is possible for addressees of decisions (persons/undertakings) to lodge an internal administrative appeal with the NMa within six weeks. This administrative appeal allows the parties to request the NMa to review its decision. A complete review of the case will then be carried out by the NMa whereby a different outcome of the case is possible. In cases where appellants are subject to a sanction, the NMa will review its decision in the light of advice received from an independent Advisory Committee. When appellants are dissatisfied with the result of this administrative appeal procedure, they may – within six weeks – appeal the decision to the administrative law chamber of the District Court. The decision of the District Court may be appealed to the Trade and Industry Appeals Tribunal.

Judicial review

5. Taking into account the restriction of rights and freedoms by decisions in competition cases, such as the prohibition of a proposed merger or the imposition of a fine, the rule of law requires that the undertakings concerned have access to judicial review. This fundamental requirement is reflected in subsection 2 of the present Chapter of the Model Law on Competition. Judicial review ensures that independent competition authorities comply with the law and makes them accountable for their decisions. It also contributes to improving the decisions of competition authorities. It is expected that the latter will carefully analyse the reasons why the court cancelled a decision, in order to avoid making the same mistake in the future. Such improved quality will have a positive impact on the reputation of the competition authority.

6. Just as the body in charge of carrying out investigations and taking the initial decisions in competition cases varies from country to country,[113] the characteristics of judicial review systems vary greatly from one country to another, too. The differences mainly relate to the court hearing the review, and the standard of review applied by this body.

Different types of courts in charge of judicial review in competition cases

7. If an addressee of a competition decision feels that the decision has violated its rights, it may appeal against the decision within a specific timeframe provided for by the law. Depending on the legal system, appeals against decisions in competition cases may be made to administrative courts, to judicial courts, or directly to the Supreme Court of a country. In addition, specialized administrative courts may be established.

8. The box below illustrates the various approaches:

[113] Most frequently, an independent competition authority is the principal enforcement body for competition law provisions. However, in certain countries, specialized ministerial departments carry out this task, whereas in a number of common law countries, specialized or general courts are responsible for taking initial decisions in competition cases.

Box 12/1. Overview of different types of entities in charge of judicial review in competition cases (first level of appeal)[114]

Administrative tribunals	Judicial courts	Specialized competition tribunals/courts	Court/Tribunal of last instance
Colombia Croatia Estonia Greece Italy Latvia Slovenia Switzerland Tunisia Venezuela (Bolivarian Republic of)	Algeria Australia[115] Belgium Brazil Côte d'Ivoire France[116] Germany Malta Netherlands Panama Romania Slovakia	Australia[117] Austria Canada Czech Republic Denmark El Salvador India Finland Kenya Peru Poland Portugal United Kingdom	Bulgaria Cyprus France[118] Turkey

9. Most jurisdictions also allow the party that loses the appeal process to appeal against the decision. This means that judicial review does not stop at the level of appeal, but may include a higher instance that controls the work of the court in charge of the appeal, usually the Supreme Court or highest administrative court of a country.

10. In a small number of countries, in addition to the appeal procedure, the parties involved may request that the government, exceptionally, overturns the decision of the competition authority based on compelling public interests.[119]

Standard of review

11. The degree of examination applied in the appeal process is called standard of review, and this varies greatly in various competition law systems. It ranges from a marginal test of

[114] Sources: UNCTAD Model Law on Competition (2007); Antitrust Encyclopedia in *Concurrences*, http://www.concurrences.com/nr_adv_search.php3; and member States' responses to UNCTAD questionnaire.

[115] For appeals against decisions regarding anti-competitive conduct.

[116] In France, judicial review of cartel and abuse of dominance cases falls within the jurisdiction of the *Cour d'Appel* of Paris.

[117] For appeals against decisions in merger cases.

[118] In France, judicial review of merger cases falls within the jurisdiction of the *Conseil d'Etat.* See http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=296.

[119] In Switzerland, for instance, in addition to the appeal procedure, according to the Cartel Act, if the Competition Commission has found a competition restraint or practices of enterprises having a dominant position to be unlawful, or if it has prohibited a concentration, the parties involved may request that the Swiss Government (Federal Council) exceptionally authorizes the agreement or the concentration based on compelling public interests.

review that is limited to procedural aspects and to manifest errors of law in a competition decision, to an intensive review that goes into the merits of the case.

12. Four levels of review intensity can be distinguished. At the lowest standard of review, the court only assesses manifest errors in the application of the law and cancels obviously unreasonable decisions (equivalent to the French *recours pour excès de pouvoir*). Under this standard of review, the court would control, for instance, whether the authority has acted within its jurisdiction and whether it has respected the basic principles of procedural fairness, for example whether it has given the persons concerned the opportunity to be heard before taking any decision against them. The second level of review consists of an assessment of the legality of the decision at stake, including compliance with procedural requirements. At this level of review, the court will assess whether the competition authority correctly interpreted the law. At the third level, the Court can fully review the merits of the case by assessing all relevant facts in addition to the correct application of the law to the facts. This standard goes beyond the control of legality, since the court also needs to assess the factual evidence at the basis of the competition decision. Finally, the most intensive standard of review allows the Court to review the case fully and substitute its own analysis for the assessment of the competition authority. This is also called a *de novo* analysis.

Alternative approaches in existing legislation – Standard of review

Country	
Review of the legality of a competition decision	
Cyprus	The Supreme Court of Cyprus, which is responsible for appeals in competition cases, is limited to reviewing the legality of the decision and cannot go into the merits of the decision under review and substitute the decision of the competition authority with its own decision.[120]
Review of legal and factual aspects of a competition decision	
Belgium	The Brussels Court of Appeal has exclusive jurisdiction over appeals in competition cases and reviews both facts and law.[121]
European Union	The standard of review applied by the European courts in competition cases has been fine-tuned by case law over time. Article 263 TFEU (former Article 230 EC) states that the Court of Justice of the European Union shall review the legality of the decisions of the European Commission. It is said that the type of action was initially modelled after the *recours pour excès de pouvoir* brought before the French

[120] See Cyprus' response to the UNCTAD questionnaire for Sixth UN Review Conference.

[121] OECD Policy Roundtables, Judicial Enforcement of Competition Law, 1996, Paul Maffféi, pp.127-132

Country	
	Conseil d'Etat, which would imply a marginal standard of review.[122] However, according to the case law of the European courts, judicial review in competition cases must firstly assess whether the evidence relied upon by the European Commission is factually accurate, reliable and consistent. Secondly, the courts must assess whether the evidence contains all the information that must be taken into account in order to assess a complex situation, and thirdly, whether it is capable of substantiating the conclusions drawn from it. On the other hand, the European courts respect that the European Commission enjoys a certain margin of discretion in the field of competition law, especially with respect to assessments of an economic nature.[123] This approach, distinguishing between the establishment of the facts and the discretionary appraisal thereof including the appraisal of economic data, can be found in several cases heard by the European courts.[124] In this context, it should be noted that the standard of review applied to the level of fine is more intensive. According to the relevant provision, the European courts have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce, or increase the fine or periodic penalty payment imposed.[125]
Netherlands	The District Court of Rotterdam, which is in charge of reviewing decisions taken by the NMa, applies an intensive degree of review for the decisions taken based on the application of Articles 101 and 102 TFEU (former Articles 81 and 82 EC). Furthermore, the Court can substitute its own judgment for the NMA's decision.
***De novo* analysis**	
Tunisia	The Administrative Tribunal of Tunis, which carries out the judicial review in competition cases, enjoys far-reaching powers. In addition to reviewing the initial decision based on factual and legal grounds, the Administrative Tribunal may hear new witnesses, and is empowered even to state completely new competition law infringements that can be proven as a result of its investigation of the matter.[126]

[122] Meij A (2009). Judicial review in the EC courts: Tetra Laval and beyond in national courts and the standard of review in competition law and economic regulation. In: Essens O, Gerbrandy A and Lavrijssen S (2009).

[123] Court of Justice of the European Union. Case C-12/03 P *Commission v. Tetra Laval* ECR I-987.

[124] Court of Justice of the European Union. Case 42/84 *Remia* [1985] ECR 2545; Tribunal of First Instance, Case T-210/01 *General Electric Company v. Commission* [2005] ECR II-5575.

[125] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 31.

[126] See Tunisia's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

13. One particular aspect of the standard of review is the admissibility of new evidence in the appeal process. This question arises when the standard of review allows the review body to assess the factual basis of the competition decision being appealed as well as the legal aspects of the decision. From member States' replies to the UNCTAD questionnaire, it appears that several countries accept new evidence in the appeal process against competition decisions, sometimes under specific conditions: in Croatia, the Administrative Court accepts new evidence that relates to the facts presented during the initial proceedings. However, evidence related to new facts is not accepted.[127] In Germany and Switzerland, new evidence is accepted at the appeal stage without any restriction.[128] Finally, it should be mentioned that certain competition law regimes limit appeals to cases that are specifically defined by law, as is the case, for example, with decisions of the Swedish Competition Authority.[129]

Suspensory effect

14. Competition law systems differ with respect to a suspensory effect of appeals against competition decisions.

Alternative approaches in existing legislation – Suspensory effect

Country	
Brazil	In Brazil, the suspension of the payment of fine during the review process requires that the fined company block the entire amount of the fine in a specific bank account.[130]
European Union	Appeals against decisions of the European Commission do not have a suspensory effect except in the case of fines, in which the payment of the fine can be suspended if a bank guarantee is provided for the full amount plus any possible interest.[131]
Netherlands	Any decision by the NMa to impose a fine is suspended during the appeal phase.[132]

[127] See Croatia's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

[128] See Germany and Switzerland's responses to the UNCTAD questionnaire for Sixth United Nations Review Conference.

[129] Chapter 7 of the Competition Act 2008. Only in those cases mentioned in Chapter 7, Article 1 of the Act may decisions taken by the Swedish Competition Authority be appealed to the market Court.

[130] Competition and the Judiciary, Second Phase, Case Studies, 2007, Sixth Annual Conference, ICN.

[131] See the European Union's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

[132] See the Netherlands' response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

Switzerland	The application of decisions by the Swiss competition authority is suspended at the Federal Administrative Tribunal stage (appeal instance); however, provisional measures can be ordered. Decisions of the Federal Administrative Tribunal on competition matters may be appealed to the Federal Tribunal (Switzerland's supreme court). Appeals to the Federal Tribunal do not have a suspensory effect.[133]

Different types of decisions

15. Once the court has assessed the appeal, it generally pronounces one of the following decisions: confirmation of the decision, annulment (fully or partly), adoption of a new decision, or sending the decision back to the competition authority for further examination.

[133] See Switzerland's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.